Crittenton Hospital *and* Local 40, Office and Professional Employees International Union, AFL–CIO *and* Local 79, Service Employees International Union, AFL–CIO *and* Rochester Crittenton Medical Laboratory Employees Association (RCMLEA) *and* Rochester Crittenton Radiological Employees Association (RCREA). Cases 7–CA–42695, 7–CA–42893, 7–CA–42979, 7–CA–43068(1), 7–CA–43068(2), 7–CA–43153, and 7–CA–43380

November 23, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND MEISBURG

On November 13, 2001, Administrative Law Judge C. Richard Miserendino issued the attached decision. The Respondent filed exceptions and a supporting brief and Charging Party Local 40, Office and Professional Employees International Union, AFL–CIO filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings, findings, and conclusions, except as modified here, and to adopt the recommended Order as modified and set forth in full below.[2]

1. The judge found that the Respondent violated Section 8(a)(5) and (1) of the Act by deleting the two provisions from the prior collective-bargaining agreement with SEIU for the LPN unit, refusing to reinsert them, and refusing to execute a final agreement containing those provisions. We disagree.

Factual Background

The complaint alleges several unfair labor practices by Respondent affecting its hospital employees who are represented in separate bargaining units by the four Charging Parties: Local 40, Office and Professional Employees International Union, AFL–CIO (OPEIU); Local 79, Service Employees International Union, AFL–CIO (SEIU); Rochester Crittenton Medical Laboratory Employees Association (RCMLEA); and Rochester Crittenton Radiological Employees Association (RCREA). With one exception discussed in section 1 below relating to the Respondent's deletion of two provisions from a tentative collective-bargaining agreement with the SEIU, we affirm the judge's disposition of the complaint's allegations.[3] However, as discussed in section 2 below, our reasons differ from those of the judge for finding that

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's credibility resolutions concerning the contract negotiations between the Respondent and three of the four Charging Party Unions, we find it unnecessary to rely on the adverse inferences drawn by the judge based on the failure of the Respondent to call certain witnesses to corroborate or rebut testimony of other witnesses at the hearing.

In the absence of exceptions, we adopt the judge's determination that the amended charge filed by the Service Employees International Union on July 19, 2000, on behalf of the Tech unit, is time barred by Sec. 10(b) of the Act.

[2] The judge failed to include in his recommended Order affirmative provisions remedying his findings of information request violations. We will modify the recommended Order so as to require the Respondent to provide the requested information to the extent consistent with this decision. We shall also modify the judge's recommended Order to require that the Respondent reimburse the employees represented by the four Charging Party Unions for any and all losses they incurred by virtue of the Respondent's unlawful unilateral changes in employees' terms and conditions of employment in the Crittenton Choice flexible benefits plan on and after January 1, 2000, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981). All payments to unit employees shall be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Also, the judge neglected to order the Respondent to bargain with the Union. We shall modify his recommended Order accordingly. Finally, we have included a new notice to conform to the language in the Order.

[3] The judge found that the Respondent violated Sec. 8(a)(5) by refusing to provide the OPEIU information concerning the discipline of nurse Adelaida Cruz. Among other things, the OPEIU asked for information concerning the discipline of all employees, in or out of the bargaining unit, with respect to absenteeism. While we agree with the judge that the OPEIU's information request is relevant to the extent it relates to the bargaining unit employees, the OPEIU failed to establish the relevance of its request with respect to nonbargaining unit employees. See *E.I. Du Pont & Co.*, 271 NLRB 1153, 1155 (1984), citing *San Diego Newspaper Guild v. NLRB*, 548 F.2d 863, 866 (9th Cir. 1977) (where the request is for information concerning employees outside the bargaining unit, the union must show that the information is relevant).

We agree with the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) of the Act by requiring the registered nurses (RNs) to become certified in advance cardiac life support (ACLS) without providing prior notification to the OPEIU and affording it the opportunity to bargain about the change and dealing directly with the bargaining unit employees. We adopt this finding because there was a past practice regarding the training and certification requirements for RNs, which past practice was reflected in a draft agreement between the Respondent and the OPEIU's predecessor (MNA). The Respondent unilaterally changed that past practice by imposing a new requirement. We further note that there is insufficient evidence to support the Respondent's contention that the new requirement was mandated by an outside authority.

Respondent violated Section 8(a)(5) by refusing an information request from OPEIU.

In the mid-1990s, the Respondent converted its nonunionized employees to a flexible health benefits plan (FBP), which provided a menu of health benefit options. In contrast, prior to 1999,[4] the collective-bargaining agreements of Respondent's unionized employees provided a fixed "core" of health benefits, including group life, health, and dental insurance. During the various negotiations for successor contracts with the Unions, the Respondent insisted that all unionized employees switch to the FBP.

The SEIU LPN collective-bargaining agreement expired on October 22, 1995, but was extended while the parties negotiated a renewal contract. On June 2, the parties reached a tentative agreement, which was subsequently ratified. The tentative agreement converted the LPN unit employees to the FBP. Under the heading of "Health Care," the relevant provision stated, "All LPNs will be enrolled in the Crittenton Hospital FBP."[5]

In December, the Respondent provided a final version of the new contract to the SEIU. The final version deleted all of the health benefit language from the prior contract and substituted the FBP provision contained in the tentative agreement. Two of the deleted provisions addressed the Respondent's obligation to pay health insurance premiums to Blue Cross Blue Shield or *its equivalent* for employees on layoff or leave of absence. Article 7, section 3.13 of the prior contract states:

> Except for employees who take permanent employment elsewhere, the Hospital will make two (2) monthly contributions for Blue Cross/Blue Shield, MVF-1 insurance (hospital-medical-surgical) or its equivalent or an HMO plan for laid-off employees who are covered by such insurance at the time of layoff.

Article 14, section 5.9 states:

> When employment is interrupted by layoff, leaves of absence or other reasons not involving loss of seniority, all group insurance coverage continues for thirty (30) days following the day when such interruption occurs and for the balance of the month in which the thirtieth day occurs. When employment and seniority is terminated, all insurance coverage continues only for the balance of the month in which such termination occurs or until the next premium is due, whichever is later.

Patricia Marich, the SEIU business representative, testified that the deletion of these two provisions from the prior contract had not been addressed at the bargaining table. While she testified that she did not view the deletion of other health benefits contract language to be improper, she never stated nor implied that the parties discussed during bargaining the deletion of the remaining health benefits language. The SEIU LPN bargaining team raised the matter of the two provisions with Michael Jagels, the Respondent's director of human resources and chief negotiator, on two occasions. Each time, Jagels stated that they were superseded by the FBP provision in the tentative agreement. The SEIU subsequently filed a grievance over the deletion of the two provisions, which Jagels denied for the same reason.

Judge's Decision

In finding that the Respondent unlawfully deleted the two provisions, the judge explained that the parties never discussed the two provisions during the contract negotiations, and rejected the Respondent's contention that the implementation of the FBP necessitated the deletions. The judge further observed that the Respondent did not delete similar provisions from the finalized SEIU Tech and unexecuted Michigan Nursing Association (MNA) agreements. The Respondent excepts to the judge's finding, arguing that the two provisions were superseded by the FBP provision in the tentative agreement.

Analysis

Section 8(d) requires "the execution of a written contract incorporating any agreement reached." However, this obligation arises only after a "meeting of the minds" on all substantive issues and material terms, and the General Counsel bears the burden of proving such an agreement. See *Intermountain Rural Electric Assn.*, 309 NLRB 1189, 1192 (1992). Whether the parties have reached a "meeting of the minds" is determined "not by parties' subjective inclinations, but by their intent as objectively manifested in what they said to each other." *MK-Ferguson Co.*, 296 NLRB 776 fn. 2 (1988).

Applying this objective standard, we find insufficient evidence to establish that the parties agreed to retain the two disputed provisions in the finalized collective-bargaining agreement. The only evidence supporting the complaint allegation is testimony that the Respondent and SEIU LPN bargaining teams never spoke about the deletion of the two provisions at the bargaining table, and that the SEIU LPN did not consider the deletion of other healthcare language to be improper. Further, the General Counsel proffered the tentative agreement and the various proposals that led to the tentative agreement to show that none of them addressed the two provisions. How-

[4] All dates are in 1999, unless otherwise noted.

[5] The provision also contained language addressing the Respondent's contribution for healthcare costs for the period of January 1 through the ratification of the contract.

ever, the General Counsel presented no affirmative evidence concerning any discussions, much less an agreement, about the effect of the FBP provision on the existing healthcare provisions in the prior collective-bargaining agreement. Thus, based on the scant record evidence, it is possible to conclude that the parties believed that the FBP provision in the tentative agreement (1) would replace all existing healthcare provisions in the prior contract, (2) would replace all of the healthcare language except the two provisions at issue, or (3) would be added to the existing healthcare provisions. On this state of the record, we cannot find a meeting of the minds.

The language of the healthcare provisions in the prior and tentative agreements sheds no light on the parties' intent. While the SEIU LPN's position that the FBP provision would coexist with the two provisions at issue may be a reasonable one, it is equally reasonable to conclude that the FBP provision would constitute the sole healthcare provision in the finalized contract, as the Respondent contends. The FBP provision was the only one under the heading of "Health Care" in the tentative agreement. In addition, the Respondent's subsequent conduct demonstrates its belief that the FBP provision would become the sole healthcare provision in the final contract. Each time that the SEIU LPN representatives addressed the matter with Jagels, the Respondent's chief negotiator, he stated that the Respondent deleted the two provisions because the parties agreed in their tentative agreement to convert unit employees to the FBP. While the Respondent reached tentative agreements with the RCREA and the RCMLEA, those agreements were not executed due to similar disputes over the precise healthcare language to be included in the final contracts. As with the SEIU LPN unit, when the Respondent submitted the final draft contract to the RCMLEA, it had deleted all of the existing health benefit language in the contract and replaced it with the FBP provision in the tentative agreement.

Contrary to the judge, we find it immaterial that the Respondent did not explain why it deleted the two provisions. Rather, as stated above, the burden was on the General Counsel to show that the parties agreed that those provisions would remain in the final contract. Likewise, it is irrelevant that purportedly similar provisions remained in the finalized SEIU Tech and unexecuted MNA agreements.[6]

[6] Contrary to the judge, we find that the unexecuted but agreed-to MNA language did not provide the same level of coverage as the deleted language here. Further, we note that this provision in the unexecuted contract was different from the provision in the previous contract.

Finally, we note that the judge's finding of a violation based on the deletion of the two healthcare provisions is inconsistent with her conclusion that the Board should not defer to the contract's grievance arbitration procedure the 8(a)(5) allegation that the Respondent unilaterally made changes to employees' FBP without notifying and bargaining with the SEIU LPN. In finding deferral inappropriate, the judge reasoned that because the Respondent and the SEIU LPN never reached an agreement on the proper language to be included in the final contract concerning the FBP there was no term or provision for an arbitrator to interpret. It is difficult to reconcile the judge's one finding, of no agreement between the parties for purposes of deferral, with his contrary finding of the requisite agreement with respect to this allegation.

In sum, we conclude that the General Counsel has failed to establish by a preponderance of the evidence that the parties agreed to retain the two disputed provisions in the finalized collective-bargaining agreement.

2. The judge also found that the Respondent violated Section 8(a)(5) and (1) of the Act when it failed to respond to the OPEIU's request for information concerning unresolved pending grievances filed by the predecessor MNA. We agree with the judge's finding, but only for the reasons set forth below.

Factual Background

The MNA was the bargaining representative for the registered nurses for several years before it ultimately lost a second election to the OPEIU in August. When OPEIU President Vickie Kasper learned that the Respondent and the MNA planned to meet to discuss unresolved grievances previously filed by the MNA, she wrote to Jagels, informing him that she wished to attend the meeting in order to protect the interests of the unit employees. She also requested information about "the date, time and location of any meetings scheduled with the MNA, and the purpose for the meeting," and asked for "copies of all such grievances to be discussed, along with the Hospital's grievance answers, as well as all correspondence between the parties, step answers, appeals, meeting notes, or other documents relating to the grievances." She further requested "the date and subject of discussion of any meetings . . . that have taken place between you and MNA representatives subsequent to the date OPEIU Local 40 was certified" and "any documents that were produced or received establishing such meetings, or as the result of the meetings." Jagels did not respond to the letter and the Respondent did not provide any of the information requested. Instead, the Respondent inquired as to whether the OPEIU would assume responsibility for the pending unresolved grievances. The OPEIU answered that it could not make that deter-

mination until it was provided the information it requested. The Respondent then informed the OPEIU that because it decided to resolve the outstanding grievances with the MNA, it did not have to provide the requested information.

Judge's Decision

In finding that the Respondent unlawfully failed to respond to the OPEIU's request for information concerning the unresolved pending grievances, the judge reasoned that the information was relevant in order for the OPEIU to understand the nature and status of the grievances so it could decide whether to assume responsibility for them.

Analysis

An employer is statutorily required, on request, to provide information that is relevant and necessary for its employees' bargaining representative to carry out its statutory duties and responsibilities. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). The Board considers data or information concerning the employees' wages, hours, and terms and conditions of employment to be presumptively relevant. *E.I. Du Pont & Co.*, 271 NLRB 1153, 1155 (1984); *Vertol Division*, 182 NLRB 421, 425 (1970). Consequently, an objecting employer bears the burden of proving that requested information relating to such subjects is irrelevant and need not be produced. *E.I. Du Pont*, supra.

Applying these principles here, we find that the information sought by the OPEIU should have been produced, although not for the reasons stated by the judge. The judge reasoned that the information was relevant in order for the OPEIU to decide whether to take over the unresolved pending grievances. However, it was the Respondent, not the OPEIU, that raised the issue of the OPEIU assuming responsibility for the grievances. As the OPEIU president stated, the OPEIU sought the information to monitor the discussions in order to protect the rights and interests of the unit members and the OPEIU itself. Thus, the OPEIU requested this information to ensure that the Respondent and the MNA did not settle a grievance in a manner that would adversely affect current unit employees and OPEIU's interests as their representative. OPEIU's request for copies of the grievances, the Respondent's grievance answers, and any other documents relating to the grievances concern the unit employees' terms and conditions of employment, and is presumptively relevant to the OPEIU's performance of its statutory functions. *Booth Newspapers, Inc.*, 331 NLRB 296, 299–300 (2000). The Respondent failed to prove otherwise. Further, we find that the OPEIU had a right to know about any meetings between the Respondent and the predecessor union regarding pending grievances. These grievances concerned the terms and conditions of employees whom OPEIU now presents. As those meetings were for the purpose of discussing and resolving those grievances, the current representative (OPEIU) had the right to information concerning those meetings.[7]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Crittenton Hospital, Rochester, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Denying registered nurses' requests for union representation during investigative meetings which the employee reasonably believes could lead to discipline and by telling them that they do not have union representation at Crittenton Hospital.

(b) Unilaterally changing terms and conditions of employment for bargaining unit employees represented by the RCMLEA, RCREA, SEIU LPN, and OPEIU by, among other things, requiring those employees to incur certain cost increases for the flexible health benefits plan on and after January 1, 2000, and by changing the plan's terms, conditions, and benefits.

(c) Dealing directly on November 22, 1999, with the bargain unit employees represented by the RCMLEA, RCREA, SEIU LPN, and OPEIU by distributing a memorandum to them announcing changes to the flexible health benefits plan.

(d) Unilaterally changing the terms and conditions of employment of the bargaining unit employees represented by the OPEIU by requiring all labor and delivery room registered nurses to become certified in Advanced Cardiac Life Saving.

(e) Unilaterally changing the terms and conditions of employment of the bargaining unit employees represented by the OPEIU by requiring all pediatric and medical surgical registered nurses to be cross-trained in each other's department.

(f) Failing and refusing to timely respond and furnish requested information relevant to the OPEIU's perform-

[7] Member Schaumber concurs with his colleagues that the Respondent must produce copies of the requested pending grievances, the Respondent's answers thereto, and other documents relating to the grievances, even though the OPEIU never responded to repeated inquiries as to whether it intended to assume responsibility for processing those grievances. The requested documents concern terms and conditions of employment of individuals now represented by OPEIU. He disagrees, however, that the dates and times of meetings previously held between the Respondent and MNA are presumptively relevant. OPEIU failed to demonstrate relevance, so he would not order the production of that information.

ance of its duties as exclusive collective-bargaining representative.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) At the Unions' request, restore the RCREA, RCMLEA, SEIU LPN, and OPEIU unit employees' terms and conditions of employment as they existed before the Respondent's unlawful unilateral changes on and after January 1, 2000, and maintain those conditions, unless and until the Respondent either reaches agreement with the Union respecting proposed changes or properly implements its proposal following a valid impasse in bargaining.

(b) Make whole, with interest, the employees represented by the Rochester Crittenton Medical Laboratory Employees Association; Rochester Crittenton Radiological Employees Association; Local 79 (LPN), Service Employees International Union, AFL–CIO; Local 40, and Office and Professional Employees International Union, AFL–CIO for any and all losses they incurred by virtue of our unlawful unilateral changes in employees' terms and conditions of employment in the Crittenton Choice flexible benefits plan on and after January 1, 2000, and reimburse them, with interest, for any expenses ensuing from the Respondent's unlawful conduct.

(c) At the OPEIU's request, restore its unit employees' terms and conditions of employment as they existed before January 20, 2000, for the labor and delivery room registered nurses and before June 19, 2000, for the pediatric and medical surgical registered nurses, and maintain those conditions, unless and until the Respondent either reaches agreement with the Union respecting proposed changes or properly implements its proposal following a valid impasse in bargaining.

(d) Make whole, with interest, the employees represented by Local 40, Office and Professional Employees International Union, AFL–CIO, for any and all losses they incurred by virtue of our unlawful unilateral changes in the employees' terms and conditions of employment, that is, the training requirements imposed upon the labor and delivery registered nurses on and after January 20, 2000; and the training requirements imposed upon the pediatric and medical surgical registered nurses on and after June 19, 2000.

(e) Furnish the OPEIU the information it requested in its respective letters of February 2 and 28, May 10, July 17, 21, and 24, 2000, and March 20, 2001, to the extent the information pertains to employees in the bargaining units set forth in appendix A.

(f) Recognize and, on request, bargain collectively and in good faith with (1) the RCREA as the exclusive collective-bargaining representative of the unit set forth in appendix A to this decision; (2) the RCMLEA as the exclusive collective-bargaining representative of the unit set forth in appendix A to this decision; (3) the SEIU LPN as the exclusive collective-bargaining representative of the unit set forth in appendix A to this decision; and (4) the OPEIU as the exclusive collective-bargaining representative of the unit set forth in appendix A to this decision.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its hospital in Rochester, Michigan, copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 22, 1999.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C. November 23, 2004

Robert J. Battista,	Chairman
Peter C. Schaumber,	Member
Ronald Meisburg,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT deny an employee's request for union representation during an investigative meeting which the employee believes may result in discipline.

WE WILL NOT tell any registered nurses that they do not have union representation at Crittenton Hospital.

WE WILL NOT unilaterally change the terms and conditions of employment of employees represented by the Rochester Crittenton Medical Laboratory Employees Association; Rochester Crittenton Radiological Employees Association; Local 79 (LPN), Service Employees International Union, AFL–CIO; and Local 40, Office and Professional Employees International Union, AFL–CIO, and more specifically, WE WILL NOT require those employees to incur certain cost increases in their flexible health benefits plan or by changing their plan's terms, conditions, and benefits without notifying the Unions and providing the Unions an opportunity to bargain over the proposed changes.

WE WILL NOT deal directly with the employees represented by the Rochester Crittenton Medical Laboratory Employees Association; Rochester Crittenton Radiological Employees Association; Local 79 (LPN), Service Employees International Union, AFL–CIO; and Local 40, Office and Professional Employees International Union, AFL–CIO, by advising them of changes to the flexible health benefits plan without first notifying the Unions and without providing the Unions an opportunity to bargain over the proposed changes.

WE WILL NOT change the terms and conditions of employment of the employees represented by the Local 40, Office and Professional Employees International Union, AFL–CIO, by requiring all labor and delivery room registered nurses to become certified in advanced cardiac life saving without notifying the Union first and providing it an opportunity to bargain over any proposed changes.

WE WILL NOT change the terms and conditions of employment of the employees represented by Local 40, Office and Professional Employees International Union, AFL–CIO, by requiring all pediatric and medical surgical registered nurses to be cross-trained in each other's department without notifying the Union first and providing the Union an opportunity to bargain over any proposed changes.

WE WILL NOT fail and refuse to timely respond and furnish to Local 40, Office and Professional Employees International Union, AFL–CIO, requested information relevant to its performance of its duties as exclusive collective-bargaining representative of the registered nurses.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on a bargaining unit employee's request, promptly contact a union representative for any investigative meeting, which the employee reasonably believes may result in discipline.

WE WILL, at the Unions' request, restore the terms and conditions of employment of the employees represented by the Rochester Crittenton Medical Laboratory Employees Association; Rochester Crittenton Radiological Employees Association; Local 79 (LPN), Service Employees International Union, AFL–CIO; and Local 40, Office and Professional Employees International Union, AFL–CIO, as they existed before our unlawful unilateral changes to the flexible health benefits plan on and after January 1, 2000, and WE WILL maintain those conditions, unless and until we either reach agreement with the Unions respecting proposed changes or we properly implement our proposal following a valid impasse in bargaining.

WE WILL make whole, with interest, the employees represented by the Rochester Crittenton Medical Labora-

tory Employees Association; Rochester Crittenton Radiological Employees Association; Local 79 (LPN), Service Employees International Union, AFL–CIO; and Local 40, Office and Professional Employees International Union, AFL–CIO for any and all losses they incurred by virtue of our unlawful unilateral changes in employees' terms and conditions of employment in the Crittenton Choice flexible benefits plan on and after January 1, 2000, and reimburse them, with interest, for any expenses ensuing from our unlawful conduct.

WE WILL, at the request of Local 40, Office and Professional Employees International Union, AFL–CIO, restore its unit employees' terms and conditions of employment as they existed before January 20, 2000, for the labor and delivery room registered nurses, and before June 19, 2000, for the pediatric and medical surgical registered nurses, and WE WILL maintain those conditions, unless and until we either reach agreement with the Union respecting proposed changes or we properly implement our proposal following a valid impasse in bargaining.

WE WILL make whole, with interest, the employees represented by Local 40, Office and Professional Employees International Union, AFL–CIO, for any and all losses they incurred by virtue of our unlawful unilateral changes in the employees' terms and conditions of employment, that is, the training requirements imposed upon the labor and delivery registered nurses on and after January 20, 2000; and the training requirements imposed upon the pediatric and medical surgical registered nurses on and after June 19, 2000.

WE WILL, furnish the OPEIU the information it requested in its respective letters of February 2 and 28, May 10, July 17, 21, and 24, and March 20, 2001, to the extent the information pertains to bargaining unit employees.

WE WILL recognize and, on request, bargain collectively and in good faith with (1) the RCREA as the exclusive collective-bargaining representative of the unit set forth in appendix A to this decision; (2) the RCMLEA as the exclusive collective-bargaining representative of the unit set forth in appendix A to this decision; (3) the SEIU LPN as the exclusive collective-bargaining representative of the unit set forth in Appendix A to this decision; and (4) the OPEIU as the exclusive collective-bargaining representative of the unit set forth in appendix A to this decision.

CRITTENTON HOSPITAL

APPENDIX A

The RCREA is the exclusive collective-bargaining representative of the following unit:

> All full-time and regular part-time non-registered technologists, registered technologists, special procedure technologists, CT technologists, registered nuclear medicine technologists and registered sonographers employed by us at our Rochester, Michigan facility and nearby out-patient facilities; but excluding, students, casual employees, guards and supervisors as defined in the Act, and all other employees.

The RCMLEA is the exclusive collective-bargaining representative of the following unit:

> All full-time and regular part-time registered and unregistered medical technical laboratory employees employed by us at our laboratory, including section heads and relief on-call; but excluding students, casual employees, guards and supervisors as defined in the Act, and all other employees.

The SEIU-LPN is the exclusive collective-bargaining representative of the following unit:

> All full-time and regular part-time licensed practical nurses employed by us at our Rochester, Michigan hospital; but excluding guards and supervisors as defined in the Act, and all other employees.

The OPEIU is the exclusive collective-bargaining representative of the following unit:

> All full-time and regular part-time registered nurses employed by respondent at its Rochester, Michigan hospital; but excluding vice president nursing and patient care services, administrative directors, department managers, nursing shift supervisors, nurse manager for psychiatric services, emergency department manager, director, community health education, head nurses, patient care coordinators, Home Health Outreach nurses, and guards and supervisors as defined in the Act, and all other employees.

John Ciaramitaro, Esq., and *Dynn Nick, Esq.*, for the General Counsel.

Lawrence F. Raniszeski, Esq., of Bloomfield Hills, Michigan, for the Respondent.

Douglas Keast, Esq., of Warren, Michigan, for the Charging Parties RCREA and RCMLEA.

Scott A. Brooks, Esq., of Detroit, Michigan, for the Charging Party, Local 40, Office and Professional Employees International Union, AFL–CIO.

DECISION

STATEMENT OF THE CASE

C. RICHARD MISERENDINO, Administrative Law Judge. These consolidated cases were tried in Detroit, Michigan, on January 8–10, 2001. Local 79, Service Employees International Union, AFL–CIO (SEIU) represents approximately 16 licensed practical nurses (LPNs) in one bargaining unit and approximately 180 nursing assistants, unit clerks, maintenance workers, processing technicians and receiving clerks (Techs) in another bargaining unit employed by the Respondent. On April 18, 2000, it filed the charge in Case 7–CA–42979 on behalf of the LPN unit. On July 19, 2000, the SEIU amended its charge asserting an additional allegation on behalf of the LPN unit and also asserting for the first time an allegation on behalf of the Tech unit. On August 25, 2000, a complaint issued on behalf of the LPN unit. On October 10, 2000, an amended complaint issued on behalf of the LPN unit and Tech unit.

Rochester Crittenton Medical Laboratory Employees Association (RCMLEA) represents approximately 40 laboratory technicians employed by the Respondent. On May 18, 2000, it filed a charge in Case 7–CA–43068(1). The Rochester Crittenton Radiological Employees (RCREA) represents approximately 50 radiology technicians employed by the Respondent. On May 18, 2000, it filed a separate, but almost identical, charge in Case 7–CA–43068(2). On August 25, 2000, separate complaints issued on both these charges.

Local 40, Office and Professional Employees International Union, AFL–CIO (OPEIU) represents approximately 300 registered nurses (RNs) employed by the Respondent. On January 11, 2000, it filed a charge in Case 7–CA–42695, which was amended on February 28, 2000. On February 29, 2000, a complaint issued on that charge. On March 24, 2000, the OPEIU filed a charge in Case 7–CA–42893, which was amended on May 17, 2000. On the same date, the cases were consolidated and an amended consolidated complaint issued. On June 19, 2000, the OPEIU filed a charge in Case 7–CA–43153, which was amended on August 21, 2000. On August 28, 2000, a second order consolidating these cases and a second amended consolidated complaint issued. On September 18, 2000, the OPEIU filed a charge in Case 7–CA–43380, which was amended on December 14, 2000. On December 15, 2000, a third order consolidating these cases and a third amended consolidated complaint issued.

On August 30, 2000, all of the above-referenced cases were consolidated for trial. On December 21, 2000, a second order consolidating cases was issued.

All of the complaints allege that on November 22, 1999, the Respondent, Crittenton Hospital (Hospital), failed and refused to bargain in good faith with the Charging Party unions in violation of Section 8(a)(5) of the Act by issuing a memo to its employees notifying them of changes to their health benefits plan and by unilaterally implementing those changes on January 1, 2000. All of the complaints further allege that in doing so, the Respondent also violated Section 8(a)(5) of the Act by bypassing the unions and dealing directly with their respective bargaining unit employees.

In addition, the SEIU complaint alleges with respect to the LPN unit, that in February 2000, the Respondent violated Section 8(a)(5) of the Act by unilaterally deleting from the final draft of a ratified collective-bargaining agreement certain provisions concerning the payment of health insurance premiums for LPNs who are on layoff and/or authorized leave of absence; by failing and refusing to reinsert the deleted contract provisions; and by failing and refusing to execute a final agreement which included the deleted contract provisions.

The OPEIU amended consolidated complaint also alleges that the Respondent violated Section 8(a)(5) of the Act: in January 2000, by unilaterally requiring the labor and delivery registered nurses to obtain an advanced cardiac life support (ACLS) certification in order to continue working in their department and by failing and refusing to bargain with the OPEIU representatives about that change; in June 2000, by requiring pediatric and medical surgical registered nurses to be cross-trained and by failing and refusing to bargain over the relocation of the pediatrics department; and on various dates between February 2 and July 31, 2000, by delaying, failing and refusing to provide requested information necessary and relevant for the OPEIU to carry out its duties as exclusive bargaining representative. Finally, the OPEIU amended consolidated complaint further alleges that on November 29 and December 1, 1999, the Respondent violated Section 8(a)(1) of the Act by refusing nurse Marie Szczerba's request for union representation during interviews that she reasonably believed would result in disciplinary action.

The Respondent filed timely answers, denying the material allegations contained in the various complaints as amended, and raising various affirmative defenses with respect to certain amended complaints. The parties have been afforded a full opportunity to appear, present evidence, examine and cross-examine witnesses, and file posthearing briefs.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Counsel for the OPEIU, and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, is an acute care hospital located in Rochester, Michigan. In the 12-month period ending December 31, 1999, the Respondent received gross revenues in excess of $250,000 and purchased goods valued in excess of $50,000 from points located outside of the State of Michigan, which were shipped directly to its Rochester, Michigan facility. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits, and I find, that the OPEIU, SEIU, RCREA and RCMLEA are labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Issues

1. Whether the amended charge filed by the SEIU on July 19, 2000, on behalf of the LPN unit and also the Tech unit, is time-barred by Section 10(b) of the Act?

2. Whether the 8(a)(5) charges, alleging unilateral changes in terms and conditions of employment of the RCREA, RCMLEA, SEIU LPN, and SEIU Tech bargaining unit employees, should be deferred to the grievance-arbitration procedure which existed under the parties' prior and/or current collective-bargaining agreements?

3. Whether the Respondent unlawfully changed the terms and conditions of employment of the employees represented by the four Charging Party Unions by requiring them to incur cost increases under the flexible health benefits plan without prior notice to the unions and without affording them an opportunity to bargain with respect to the cost increases and other changes?

4. Whether the Respondent unlawfully bypassed the Charging Party Unions and dealt directly with the bargaining unit employees by advising them in a November 22, 1999 memo that some of the costs associated with the flexible health benefit plan would increase and by requiring the employees to respond to the memo by December 3?

5. Whether the Respondent unlawfully deleted provisions from a finalized collective-bargaining agreement with the SEIU LPN unit without notifying the SEIU or affording it an opportunity to bargain about the deletions; by failing and refusing to reinsert the deleted provisions; and by failing and refusing to sign a final contract with the SEIU which contained the deleted provisions?

6. Whether the Respondent unlawfully bypassed and dealt directly with the RNs by requiring them to become ACLS certified without providing prior notification to the OPEIU and affording it the opportunity to bargain about the change?

7. Whether the Respondent unlawfully relocated the pediatrics unit and thereafter required the pediatric RNs and medical surgical RNs to be cross-trained without affording the OPEIU prior notice and the opportunity to bargain over the same?

8. Whether the Respondent unlawfully denied employee Marie Szczerba her *Weingarten* rights?

9. Whether the Respondent unlawfully failed and refused to provide the OPEIU information concerning: past and pending grievances; employee parking; the discipline of nurse Adelaida Cruz; addresses and telephone numbers of RNs; and information used in preparing investigative reports concerning two bargaining unit employees?

B. The 10 (b) Issues

1. The LPN direct dealing allegation

In its posthearing brief on page 23, footnote 18, and also on page 58, second paragraph, the Respondent argues that the SEIU LPN allegation that the Respondent dealt directly with the bargaining unit employees and made unilateral changes to the flexible benefits plan is time-barred because it was first raised in an amended charge filed on July 19, 2000. The Respondent asserts that it issued a memorandum announcing the changes to the employees on November 22, 1999, which was more than 6-month prior to the filing of the amended charge.

Section 10(b) is an affirmative defense and, if not timely raised, it is waived. *DTR Industries*, 311 NLRB 833 fn. 1 (1993), enf. denied 39 F.3d 106 (6th Cir. 1994). The Respondent first raised the 10(b) defense in its posthearing brief and did not plead it as an affirmative defense in its answer. The original SEIU complaint, which issued on August 25, 2000, concerns only the LPN unit employees. (GC Exh. 1(gg).) It alleges that the Respondent violated the Act by deleting section 5.9 and 3.13 from the final draft of the ratified LPN collective-bargaining agreement, by refusing to reinsert those provisions, and by refusing to execute a final contract which contains those provisions. It further alleges that the Respondent violated the Act on November 22, 1999, by announcing by memo to the LPN unit employees that there would be changes to their flexible benefits plan. In its answer to that complaint, the Respondent failed to assert Section 10(b) as an affirmative defense. (GC Exh. 1(tt).) I therefore find that this defense with respect to the SEIU LPN unit amended charge is waived.

2. The Tech direct dealing allegation

On October 10, 2000, an amended SEIU complaint issued alleging that the Respondent similarly violated the Act on November 22, 1999, by announcing to the Tech unit employees that there would be changes to their flexible benefits plan. (GC Exh. 1(yy).) In its answer to the amended complaint, the Respondent asserts that the amended portion of the complaint (i.e., the allegation concerning the Tech unit employees) should be dismissed as untimely. Specifically, it states:

> 24. In further answer to the Regional Director's Amended Complaint, the Respondent maintains that the Amended portion of the Complaint should be dismissed as untimely. The charge upon which the Amended Complaint was based was filed on September 20, 2000, more than six (6) months after the date (11–22–99 letter) the Charging Union complains the Respondent engaged in an Unfair Labor Practice. The allegations in the Amended Complaint are not sufficiently related to the original Charge of Regressive Bargaining to justify ignoring the sixth month limitations.Therefore, the Amended portion of the Complaint should be dismissed as being untimely. [GC Exh. 1(ccc).]

Although the Respondent did not specifically argue in its posthearing brief that the SEIU amended charge pertaining to the Tech unit is untimely, it did raise the issue during its opening statement at trial.[1] (Tr. 14.) I find that the Respondent reiterated its 10(b) affirmative defense at trial and that the defense has merit.

The evidence shows that on November 22, 1999, the Respondent issued a memorandum to its employees notifying

[1] I find that through inadvertence the Respondent's counsel argued that the amended complaint, rather than the amended charge, was untimely filed.

them of changes to their flexible health benefits plan that would, and did, take effect on January 1, 2000. However, the SEIU did not file an underlying charge, timely or otherwise, on behalf of the Tech unit asserting that the conduct violated the Act.

The evidence further shows that in February 2000, the Respondent deleted certain provisions from the draft of a final collective-bargaining agreement covering the LPN unit. On April 18, 2000, the SEIU filed a charge solely on behalf of the LPN unit alleging that the Respondent had violated the Act by deleting these provisions. (GC Exh. 1(l).)

On July 19, 2000, the SEIU amended the original LPN charge asserting that the Respondent dealt directly with employees in the LPN on November 22, 1999, and for the first time added an allegation that the November 22 conduct also constituted a violation with respect to the Tech unit employees.

Applying the "closely related test" set forth in *Redd-I, Inc.*, 290 NLRB 1115 (1988), and *Nickles Bakery of Indiana*, 296 NLRB 927 (1989), I find that there is no nexus between the allegation raised in the amended charge concerning the Tech unit and the allegation raised in the underlying charge concerning the LPN unit. The alleged unlawful conduct alleged in the original charge involved different bargaining unit employees, different contract negotiations, and factually different conduct by the Respondent. Thus, the amended charge as it pertains to the Tech unit is untimely. Accordingly, I shall recommend dismissal of the allegations concerning the SEIU Tech unit in the amended complaint in Case 7–CA–42979.

C. Facts

1. Background

The Respondent employs 1300 employees of which approximately 650 are represented by the four Charging Party Unions. All of these unions, with the exception of the OPEIU, have had long established bargaining relationships with the Respondent.

In the mid-1990s, the Respondent's nonunionized employees were placed under a flexible health benefits plan called the "Crittenton Choice Flexible Benefits Program," which gave the nonunionized employees the option of selecting different types of health benefits. Under the Crittenton Choice plan these employees could choose from three different health care plans, two different dental plans, five different life insurance plans, five different accidental death and dismemberment plans, and six different short term and long term disability plans. Each insurance plan was assigned a dollar value. Every nonunionized employee was allotted a certain amount of "flex dollars" annually from which the cost of each selected plan was deducted. If the value of the plans selected by the nonunion employee exceeded the amount of flex dollars allocated, the nonunion employee was required to pay the difference by payroll deduction. The evidence shows that there were yearly incremental cost increases associated with the flexible benefits plan.

In contrast, prior to 1999, the health benefits of the unionized employees represented by the SEIU, RCEA, RCMLEA, and Michigan Nurses Association (MNA)[2] were covered by collective-bargaining agreements which provided a "core" of health benefits including group life, health, and dental plan insurance. The full cost of the health benefit plans for unionized employees, for the most part, was paid by the Respondent. All of the union contracts provided basically the same health insurance coverage, i.e., Blue Cross/Blue Shield Comprehensive Major Medical (BC/BSMM) or equal coverage, with an annual deductible of $250 for singles and $500 for families. (GC Exhs. 60, pp. 23; 71, pp. 35; 63, p. 43; and R. Exh. 8, p. 45.) The RMCLEA and RCREA contracts provided that the Respondent would pay the total cost of Blue Cross/Blue Shield Comprehensive Major Medical (or equal coverage) for full-time employees, and where applicable, 90 percent of the cost of the monthly premium, for their families, subject to an annual deductible of $250 single and $500 family and copay of 10 percent by the employee, with a maximum annual copay of $1000. Coverage included a prescription drug plan with a $5 copay. (GC Exh. 63, p. 43; GC Exh. 60, p. 23.) The SEIU contract provided that the Respondent would pay the total cost of the BC/BSMM for full-time employees and their families, subject to an annual deductible of $250 single and $500 family and copay of 10 percent by the employee, with a maximum annual copay of $1000. Coverage included a prescription drug plan with a $5 copay. (GC Exh. 71 p. 35.) A similar provision was contained in the collective-bargaining agreement between the Respondent and the MNA, the predecessor union to the OPEIU. (R. Exh. 8, p. 45.)

Over the years, the Respondent had unsuccessfully sought in collective-bargaining negotiations to convert the unionized employees to the flexible benefits plan. In the mid-1990s, as each collective-bargaining agreement drew close to expiration, the Respondent reiterated its intent in having the bargaining unit employees convert to the Crittenton Choice plan and effectively took the position that any new contract would require the bargaining unit employees to participate in the plan.

2. The RCREA, SEIU, and RCMLEA bargaining units

a. The RCREA negotiations

The most recent RCREA collective-bargaining agreement covered the period of March 29, 1995, through March 28, 1999, (GC Exh. 60) and was extended while the parties negotiated a renewal contract. Those negotiations began in February 1998, lasted about 2 months, and were completed in five or six sessions.

The Respondent's initial proposals were labeled "noneconomic" and "economic" by its chief negotiator, Michael Jagels, director of human resources. (GC Exh. 70a–u.) One of its first economic proposals sought to modify the language of the BC/BSMM health plan and to increase the employee's copay percentage from 10 to 20 percent. (GC Exh. 70r.) The contract language remained unchanged in all other respects, including the language indicating that the Respondent was responsible for paying the total cost of the health plan. Jagels for un-

[2] On November 22, 1999, the OPEIU was certified as the exclusive bargaining representative of the registered nurses, after winning a Board-conducted election.

known reasons withdrew the proposal soon after it was introduced. He indicated that it would be resubmitted with modifications at a later time, but never did so.

Instead, Jagels subsequently advised the RCREA bargaining committee that the BC/BSMM plan would no longer be available to them because there were too few bargaining unit members covered by the plan. As a cost-savings measure, he verbally proposed that the RCREA bargaining unit employees switch to the Crittenton Choice plan. (Tr. 308.) RCREA President Joseph Addington testified that the RCREA rejected the proposal more than once during the course of the negotiations because the union was concerned that its bargaining status would be diminished, if the unit employees were allowed to pick and choose their own health benefits, rather than have the RCREA negotiate a package for them. (Tr. 290.)

Eventually negotiations got to the point where the Respondent insisted that unless the bargaining unit employees switched to a flexible benefits plan, there would be no new contract. Jagels testified that the Hospital had reached the point where some employee participation in the cost of health care benefits was necessary. (Tr. 422.) He stated that he explained to the RCEA bargaining team that there was no guarantee that the cost of health benefits might not increase depending upon what benefit plan an employee selected. (Tr. 425.) However, RCREA President Addington testified that the RCREA bargaining team was not concerned about the total cost of the flexible benefits plan "[b]ecause that [was] not something that our membership [was] bearing." (Tr. 296.) He stated that during one particular negotiating session, he asked Jagels whether the Respondent would provide enough flex dollars to cover the cost of equivalent benefits, and Kathleen Gatz, director of payroll and benefits, who was present at that session, responded, "Yes!" in the presence of Jagels.[3] (Tr. 296–297, 300, 510.) Addington testified that the RCREA bargaining team wanted to make sure that the benefits under the flexible benefits plan were equivalent to the benefits received by the unit employees under the contractual "core benefits" plan. (Tr. 295–296.)

On or about April 1, 1998, the Respondent followed up its verbal proposal with a written health care proposal, which stated:

Health Care:

> Current plan as listed in the contract remains in effect until-September 7, 1998. At that time RCREA will be under the same Health & Welfare Option plan as all nonunion/managerialemployees. [GC Exh. 61-B.]

Addington testified that the RCREA rejected that proposal because it lumped the bargaining unit employees with the nonunion employees and implied that the RCREA had no control over or no right to negotiate benefits. (Tr. 285.) Instead, the union told Jagels that it would only accept language stating that the unit employees would join the flexible benefits plan. As Jagels testified, the RCREA negotiating team did not request language indicating that there would be no increase in costs to the employees or no change in benefits. He also testified that he did not promise that benefits would not change or that costs would not increase in the future. (Tr. 429–430.)

On April 8, Jagels submitted a revised written proposal that stated:

HEALTH CARE:

> Effective July 6, 1998 RCREA will be enrolled in the Crittenton Hospital Flexible benefits plan. [GC Exh. 61–A.]

The parties signed-off on the proposal as written thereby reaching a tentative agreement.

Prior to the ratification vote, the Respondent held a meeting to explain to the bargaining unit employees the advantages of the flexible benefits plan. (Tr. 317.) The meeting was conducted by Director of Payroll and Benefits Kathleen Gatz, who described the flexible benefits plan and answered questions.[4] She told the employees that they would have more choices under the flexible benefits plan because they did not have to select benefits that they did not want or need. She also passed out literature explaining how the flexible benefits plan worked.

Derik White, a RCREA bargaining unit employee, testified that he went to the meeting specifically to find out whether the cost of the flexible benefits plan would increase during the contract term. He stated that his wife had been on the flexible benefits plan as a nonunion employee for a couple of years during which time the cost of benefits had increased each year. White testified that he was told, "that the cost [to the bargaining unit employees] would not be increased during the contract. That was something that would have to be bargained for." (Tr. 318.) In contrast, Gatz testified that she never told the bargaining unit employees that there would be no change in benefits or cost during the term of the agreement. (Tr. 524.)

A tentative agreement was ratified by the RCREA on April 8, 1998, but a final agreement was never consummated because a dispute arose over the language to be inserted in the contract concerning the flexible benefits plan. Notwithstanding the disagreement over language, the parties implemented the changes covered by the tentative agreement to the prior collective-bargaining agreement, which had been extended by the parties. (Tr. 284.)

b. The SEIU Tech unit negotiations

The SEIU Tech bargaining unit collective-bargaining agreement expired in 1995, but was extended by the parties while they negotiated a renewal contract, which took over three years to negotiate. (Tr. 381; 430, R. Exh. 22.) Jagels testified that during the negotiations, he did not make any commitment that health benefits would not change or that costs would not increase. (Tr. 431.) He further testified that he explained to the SEIU Tech bargaining team that if there were cost increases, the bargaining unit members would share those increased costs. (Tr. 431.) Jagels added, however, that he told the SEIU Tech

[3] Jagels testified that Gatz never promised in his presence that benefits would not change or that costs would not increase. (Tr. 429.) Gatz testified that she did not tell employees that the cost to them would not change during the duration of the contract. (Tr. 512, 514, 530.) But neither of them denied telling the RCREA bargaining team that there would be sufficient flex dollars to cover the cost of equivalent benefits.

[4] Gatz testified that Benefits Representative Elaine Zywica also attend this meeting. (Tr. 510.) Zywica did not testify at trial.

bargaining team that "at least at the outset, there would be sufficient flex dollars contributed by the Respondent to cover the core benefits." (Tr. 432.) In contrast, Charlene Collis, a SEIU Tech Union Steward, who was a member of the Tech unit bargaining team, testified that there were no discussions at the bargaining table about increasing the employee medical benefit contribution for the same coverage that existed under the prior contract. (Tr. 380; 386.)

In early November 1998, a tentative agreement was reached and ratified by the Tech unit employees. It stated that "Effective January 1, 1999, or as soon as possible thereafter, SEIU employees will be enrolled in the hospital's flexible benefit program." (GC Exh. 80.) The union did not request language guaranteeing that their costs would not increase or that their benefits would not change. (Tr. 433.)

On or about November 13, 1998, a final contract for the SEIU Tech unit employees was signed which extended from November 13, 1998 through November 13, 2001.[5] (GC Exh. 73.) Regarding group insurance it states, in relevant, part:

ARTICLE XV
GROUP INSURANCE

Section 1. Effective January 1, 1999, SEIU employees are enrolled in the Hospital Flexible benefits plan. This will include Health, Dental, Vision, Disability, Life Insurance.

Section 2. General Provisions.

The Hospital shall select or change the insurance carrier under this Article or
be self-insured in its discretion and shall be entitled to receive any dividends, refunds or rebates earned without condition or limit of any kind.

(b) All benefits shall be subject to standard provisions set forth in the policy or policies. Communication materials provided to unit members relative to such benefits, generally provided but not limited to the time of the annual open enrollment, will also be sent to the main office of SEIU Local 79, AFL–CIO, to the attention of the appropriate Business Representative.

(c) Unless an effective date for a specific benefit is stated to the contrary in any other provision of this Agreement, benefits for otherwise eligible new employees will become effective on the first day of the month following date of hire.

(d) 1. When employment and/or seniority are interrupted by layoff, discharge, quit, strike or retirement, all insurance coverage continues only for the balance of the pay period in which such termination occurs.

2. When on authorized leave of absence, the employee is responsible for their flex payment and the Hospital will pay it's share of the employees premiums during the first thirty (30) days, which would include the Five (5) no pay day period. If the period of authorized absence is over thirty (30) days including the five (5) no pay's the employee must contact the Benefits Department regarding arrangements for payment.

(e) The Hospital shall have no obligation to duplicate any benefit an employee receives under any other policy with any other employer with the exception of life and retirement insurance, notwithstanding the circumstances of eligibility, amount or duration of benefit. It shall be the obligation of the employee to inform the Hospital of any and all insurance coverage enjoyed by said employee other than coverage provided by the Hospital.

(f) Should the Hospital be obligated by law to contribute to a governmentally sponsored insurance program, national or otherwise, which duplicated the benefits provided by the Hospital under insurance policies currently in effect as a result of this Agreement, it is the intent of the parties that the Hospital not be obligated to provide double coverage and to escape such double payments, the Hospital shall be permitted to cancel benefits of policies which duplicate, in whole or in part, compulsory governmentally sponsored insurance programs.

(g) The Hospital's obligation under this Agreement to provide insurance benefits to employees ceases upon the employee reaching normal retirement age, subject to the requirements of the Age Discrimination in Employment Act.

c. The RCMLEA negotiations

The RCMLEA collective-bargaining agreement extended from July 23, 1995, through July 22, 1998, (GCExh. 63) and was extended while the parties negotiated a renewal contract. Those negotiations began in May 1998 and for the most part were conducted simultaneously with the RCREA negotiations. The RCMLEA bargaining committee included Steve Smithson, who was then union president, Karen Rezanka, Joe Jabinski, Attorney Douglas Keast, and (former union secretary) Christine Binkowski. The Respondent's team consisted of Jagels and James Cook, the administrative lab director.

As was true with the RCREA negotiations, the Respondent's proposals initially were labeled "non-economic" and "economic." (GC Exh. 65A–65Q.) The Respondent from the outset sought to transfer the RCMLEA bargaining unit employee to the flexible benefits plan. Respondent's "Non-Economic Proposal #7" struck the introductory sentence of the existing contract language and substituted the following: "Effective first full pay period following ratification Laboratory employees will be enrolled in the Hospitals Flexible (sic) Benefit program." (GC Exh. 65Q.)[6] Union Secretary Binkowski testified that the RCMLEA bargaining team was very concerned about the flexible benefits plan, which it had twice rejected in prior contract negotiations. She stated that the bargaining unit employees were concerned that "the benefits would change, that the cost incurred to employees would change, that enough money would not be provided to buy the same coverage that we have." (Tr. 245.) The bargaining team therefore asked specific questions about changing benefits and increasing costs being passed to the unit employees. Accordingly to Binkowski, Jagels

[5] Except for the language concerning the flexible health benefit plan that was inserted in sec. 1, the language in the old contract pertaining to insurance remained unchanged.

[6] Jagels testified that he inadvertently mislabeled the proposal. (Tr. 477–478.)

assured them that their benefits would be maintained and "there would be no added costs to employees." (Tr. 242–243.)

Binkowski further testified that Gatz attended one bargaining session where she reiterated that there would be no additional cost to the employees by switching from the current plan to the flexible benefits plan. (Tr. 246; GC Exh. 63, p. 43.) According to Binkowski, Jagels and Gatz told the RCMLEA that the plan was "flexible" because it allowed the unit employees to "pick, choose, delete, add, negate certain benefits that were in the benefit plan." (Tr. 246; 255.) She stated that no one from the Respondent explained that "flexible" also meant that the Respondent had the flexibility to change things.

Jagels testified that during the RCMLEA negotiations, he took the same position that he took with the radiology and SEIU Tech negotiations and that he did not make any statements that were inconsistent with what he stated in the prior negotiations. (Tr. 434.) Although he confirmed that Gatz attended one negotiation session to "clarify issues," Jagels denied that Gatz told anyone in his presence that benefits and costs would not change. (Tr. 442.) Gatz likewise denied that she stated that there would be no change in benefits or costs during the term of the agreement. (Tr. 524.) Jagels also pointed out that the RCMLEA bargaining team did not request any language prohibiting the Hospital from increasing the costs of the flexible benefit plan.

The RCMLEA unit employees attended the information meeting with the RCREA unit employees in which the Respondent sought to persuade them to accept the flexible benefits plan. Binkowski testified that employees specifically asked and were told that there be would no cost increase to them and that benefits would not change during the life of the contract.[7] (Tr. 249–250.) RCMLEA President Karen Rezanka also testified that the unit employees were told that they would be provided with a sufficient amount of flex dollars to buy the basic coverage that they had previously. (Tr. 267.) She stated that Gatz handed out examples of what she was going to explain so everyone could follow along. She told the employees that there would be enough flex dollars to cover their core benefits and if there were going to be any changes the changes would occur when the contract expired. (T. 272, 274.)

The parties reached a tentative agreement on January 29, 1999 (GC Exh. 64), which was ratified in February 1999. According to Binkowski, the type of health benefits were to be the same. (Tr. 238.) The BC/BSMM became the default plan in the flexible health plan, unless a unit employee opted for a more expensive plan at a cost. (Tr. 260.) The RCMLEA bargaining team typed up the final agreement and submitted it to Jagels for proofreading. Jagels deleted all of the existing health benefit language in the contract (GC Exh. 63, p. 43), and instead inserted a single sentence stating, "Effective January 1, 1999, or as soon as possible thereafter, all Laboratory Employees will be enrolled in the Crittenton Hospital Flexible benefits plan." A controversy arose over the proper language to be included in the final contract, which was never signed.

The parties implemented the terms of the prior contract as amended by the tentative agreement. Binkowski and Rezanka testified that for the first year following ratification, the basic core benefits remained unchanged and that these benefits were provided at no cost to the employees. (Tr. 249; 275.)

d. The SEIU LPN unit negotiations

The SEIU LPN collective-bargaining agreement expired on October 22, 1995, (GC Exh. 71) and was extended by the parties while they negotiated a renewal contract, which took almost four years to negotiate. In the course of negotiations, the Respondent similarly sought to persuade the SEIU LPN bargaining team to convert their unit employees to the flexible benefits plan. According to Patricia Marich, SEIU business representative, when Jagels was asked if a changeover would result in a cost increase to the employees, he responded, "No" and explained that the employees would be awarded enough flex dollars to pay for the same level of core benefits that they had under the prior contract. (Tr. 346.) Union Steward Ella Hainor stated that Jagels and Gatz told them during negotiations that there would be no cost increase to the membership in order to maintain the same coverage. (T. 372.) Hainor testified that the union took Jagels on his word, and therefore did not insist on language covering cost increases in the tentative agreement. (Tr. 374.) Marich testified that at no time during negotiations did the SEIU agree that the Respondent could pass any cost increases of core benefits to the unit employees. (Tr. 347.)

On June 2, 1999, the SEIU LPN and Respondent reached a tentative agreement which made changes to the prior contract and more significantly transferred the LPN unit employees to the flexible benefits plan. (Tr. 366;GC Exh. 77.) The tentative agreement was ratified by the bargaining unit employees. The Respondent was responsible for preparing a final agreement for signature. Six months later, in December 1999, the Respondent submitted a final version of the new contract to the SEIU that deleted two provisions in the prior contract that had not been discussed at the bargaining table. (Tr. 344, 368.) Specifically, the Respondent deleted article VII, section 3.13 and Article XIV, Section 5.9 of the prior contract. (GC Exh. 72, p. 24 & 33, respectively.)

When the LPN bargaining unit team brought the matter to Jagels' attention, he told them that the contract revisions "are in keeping with the signed Tentative Agreement." (GC Exh. 74.) Marich testified that Jagels refused to reinsert the deleted language, but was willing to sign the agreement without reinserting Sections 3.13 and 5.9. (Tr. 347). By letter, dated February 24, 2000, Marich disputed Jagels' interpretation and sought a "special conference" to resolve the matter. (GC Exh. 75.) Jagels replied that he would not be available to meet until the second week of April, whereupon Marich phoned him to obtain an earlier meeting. (Tr. 335–336; GC Exh. 76.) Over the phone, Jagels told Marich that by accepting and ratifying the tentative agreement the SEIU LPN bargaining team had agreed to any and all changes with regard to any kind of health insurance provision. Marich disputed that interpretation demanding that

[7] Binkowski also testified that at another employee meeting conducted by Benefits Representative Elaine Zywica, the employees were told by Zywica that there would be no cost increase to the employees. (Tr. 249.) Zywica did not testify at trial.

Jagels show her where that was stated in the tentative agreement.

On or about April 12, 2000, Marich and bargaining team member Ella Hainor met with Jagels and Gatz to discuss the deleted language concerning the Respondent's obligation to incur the cost of health care premiums during a layoff or approved leave of absence. Although the tentative agreement contained no language specifically addressing sections 3.13 and 5.9, Jagels maintained that by accepting the flexible benefits plan, the disputed language was null and void. As the meeting ended, Marich told Jagels that the SEIU intended to file a grievance over the matter, which it did on April 12, 2000. (GC Exh. 78.)

3. The November 22, 1999 letter

In the aftermath of all the controversies over the flexible benefits plan language to be inserted in the final agreements and the provisions that were deleted from the LPN final agreement, the Respondent, on November 22, 1999, distributed a memo signed by Gatz advising all employees, union and nonunion, of changes to the flexible benefits plan for year 2000. The memo stated, in pertinent part:

> You will have the same options to choose from in 2000 that were available in 1999. However, in the medical options there will be some changes to reflect the increasing cost of medical care.
>
> . . . .
>
> Crittenton costs are expected to increase in 2000 but at a lower rate. However, just like all health care consumers, we have seen significant increases in prescription drug costs. To better control costs in 2000, all medical options will have a $10 drug co-payment per prescription for generic drugs and a a $20 co-payment per prescription for brand-name drugs. There are still some prescriptions that are not covered under the plans.
>
> Employee medical contributions also will increase between $4 and $15 a pay period depending upon the option you choose and the coverage you elect. This is a very modest increase that keeps the employee costs of the options available under Crittenton Choice very competitive with similar employers. Crittenton continues to pay a significant portion of the cost of the medical options. [GC Exh. 2.]

Union members receiving the memo were surprised and upset that their prescription drug co-pay was increasing from $5 to $20 and their basic dental plan was being replaced by an indemnity dental plan or an HMO dental plan. (Tr. 275.) In addition, the level of coverage that they could purchase under the new dental plan was decreased from 100 percent coverage to lesser amounts depending upon which new plan was selected.

Jagels testified that he did not notify any of the unions in advance of the upcoming changes because his "understanding of the tentative agreement that was signed was that they agreed to be involved in a flexible benefits plan." (Tr. 441.)

4. Credibility resolutions concerning the contract negotiations

Jagels' testimony concerning the specifics of what was discussed during negotiations was unpersuasive and incredulous. Regarding negotiations with the RCMLEA, and SEIU units, his testimony was short on specifics. When asked to explain what he specifically told the RCREA bargaining team about the cost sharing aspects of the flexible benefits plan, he equivocated and repeatedly testified "I believe I was" and "I believe my answer was" and "I believe I said." (Tr. 424–426.) Only after being pressed to be more specific did he state that he explained the aspects of cost sharing to the bargaining team. In response to one of many leading questions by the Respondent's counsel, Jagels stated that he did not make any statements to the LPN unit bargaining team that were inconsistent with the statements he made to the other units. (Tr. 438.) In response to my questions, he responded as follows:

> JUDGE MISERENDINO: Do (sic) you recall specifically what you told them?
>
> THE WITNESS: The message was always the same. The Director of the Board said that we have to get all employees on the flexible benefit plan.
>
> JUDGE MISERENDINO: I'm more interested in what was discussed across the table.
>
> THE WITNESS: It would have been
>
> . . . .
>
> JUDGE MISERENDINO: Not what it would have been. I want to know if you recall what they asked you and what you said to them?
>
> THE WITNESS: What I recall is that the questions were probably the very same that came from other groups as to what's going to happen to the costs. All I could tell them was that, initially, their costs would remain as is. But, because as we go forward, I can't guarantee that there's not going to be changes. [Tr. 439.]

In addition, Jagels' testimony was not corroborated by credible evidence. Although he was accompanied at the bargaining table by at least one other person for the Respondent in each unit's contract negotiation, none, except Gatz,[8] was called to corroborate any aspect of his testimony. (Tr. 239, 288, 355, 421.) James Cook was present for the RCMLEA negotiations. (Tr. 239, 264.) James Stopford was present for the RCREA negotiations. (Tr. 288, 421.) The failure of the Respondent to call another bargaining team member to corroborate Jagels' testimony warrants an adverse inference that the witnesses' testimony would have been adverse to the Respondent's interest. *Consolidated Printers*, 305 NLRB 1061, 1066 (1992).

Nor did the Respondent call as a witness its Employee Representative Elaine Zywica, who according to the unrebutted testimony, told bargaining unit employees at an information meeting that there would be no cost increase to the unit employees. (Tr. 247–249.) The failure of the Respondent to call

[8] Jagels testified that Gatz appeared at a RCMLEA negotiation session to clarify issues pertaining to the flexible benefit plan, but was not present for the entire negotiations. (Tr. 442.)

Zywica as a witness to rebut the testimony of the unions' witnesses warrants an adverse inference that had she been called to testify, her testimony would not have supported the Respondent's position.

Further, Jagels' testimony that he told the bargaining unit teams their benefits might change and their cost for health benefits might increase was contradicted by several union witnesses who sat across the table from him at different times in different unit negotiations. RCREA President Joseph Addington credibly testified that Gatz, in the presence of Jagels assured his bargaining team that there would be adequate flex dollars to cover the cost of equivalent core benefits under the old contract. (Tr. 296–297, 300, 510.) SEIU Tech Union Steward Charlene Collis testified that there was no discussion at the bargaining table about increasing the employee cost contribution under the flexible benefits plan for the same level of coverage that they had under the prior contract. (Tr. 380.) RCMLEA Binkowski testified that Jagels assured her group that benefits would be maintained and that there would be no additional cost to the employees. (Tr. 242–243.) SEIU Business Representative Patricia Marich testified that Jagels told her group that there would be no cost increase to the employees in order to maintain the same coverage. (Tr. 372.) Their testimonies are consistent and corroborative of each other, and they contradict Jagels' assertions that everyone was put on notice that both benefits and costs under the flexible benefits plan would be subject to change during the contract term with a portion of the cost increase being absorbed by the employees.

For these, and demeanor reasons, I do not credit Jagels' testimony that he told the individual bargaining teams that employee benefits could change during the contract term and there could be a cost increase to the employee during the term of the collective bargaining agreements.

Finally, the testimony of Kathleen Gatz on this point is equally unconvincing. To begin with, her role in negotiations as evident from her testimony was limited to attending one negotiating session with the RCMLEA to "clarify issues."[9] Gatz did not deny that she told Addington that there would be sufficient flex dollars to cover the cost of flexible health benefits. (Tr. 296–297.) However, she did deny ever telling employees in a meeting prior to ratification that there would be no change in benefits or cost to the employees during the term of the contract. (Tr. 524.) Her testimony was credibly contradicted by RCREA bargaining unit employee Derik White (Tr. 318), and RCMLEA President Rezanka and RCMLEA Steward Binkowski. (Tr. 267, 249–250.) For these, and demeanor reasons, I do not credit the testimony of Gatz that she did not tell the employees that their benefits would not change and that their cost would not increase during the term of the agreement.

[9] Gatz did not testify about discussions at the bargaining table during the LPN unit negotiations, even though the evidence shows that she attended some of those sessions. The failure of the Respondent to elicit testimony from her concerning these negotiations warrants an adverse inference that her testimony would not have supported the Respondent's position.

5. The registered nurses' bargaining unit

The Michigan Nurses Association had a collective-bargaining agreement with the Respondent covering the period of July 1, 1993, through June 30, 1995. (R. Exh. 8.) Negotiations for a new contract took 4 years. On March 15, 1995, the OPEIU filed a petition seeking to represent the Respondent's registered nurses. An election took place on May 25, 1995. The ballots were impounded, however, pending Board determination of the Respondent's request for review of the Regional Director's Decision and Direction of Election. On June 30, 1999, the Board issued its Decision on Review and Order vacating the prior election and remanding the case to the Board's Region. On August 26, 1999, another election was conducted, which the OPEIU won and the incumbent union, MNA, filed objections. (R. Exh. 23.)

In the interim, the contract between the MNA and Respondent expired on June 30, 1995, but was extended by mutual agreement of the MNA and Respondent as they attempted to negotiate a renewal contract.

On January 1, 1999, in the midst of negotiations, the Respondent unilaterally enrolled the registered nurses in the flexible benefits plan.[10] On January 25, 1999, the MNA and Respondent reached a tentative agreement for a new contract. (R. Exh. 3.) Unlike all of the other tentative agreements, the registered nurses' tentative agreement did not contain any language or even a single sentence referencing the flexible benefits plan. The Respondent nevertheless attempted to insert such language in the finalized collective-bargaining agreement, which was almost identical to the other proposed contracts, i.e., "Effective January 1, 1999, MNA employees are enrolled in the revised Hospital Flexible Benefit Program." (R. 27, p. 3.) A dispute arose over the language concerning health benefits to be included in the new contract.[11] The MNA took the position that the old contract language applied because there was no language in the tentative agreement addressing the issue. The Respondent took the position that the provisions of the flexible benefits plan it implemented on January 1, 1999, should be included in the contract.

The MNA filed a charge alleging that the Respondent unlawfully refused to sign the contract. On October 29, 1999, the Board's Regional Director dismissed the charge on the grounds that there was insufficient evidence of a meeting of the minds between the parties concerning health care benefits. (Tr. 408; R. Exh. 23.) The evidence nevertheless shows that from January 1, 1999, the registered nurses were enrolled in the flexible benefits plan at no additional cost to them.

In the interim, in August 1999, the OPEIU won a second election to represent the RNs employed by the Respondent. The MNA filed objections. On September 1, OPEIU President Vickie Kasper sought an introductory meeting with Jagels. He declined to meet, however, in light of the MNA objections, until such time as it was designated as the certified bargaining

[10] There is no evidence that the MNA filed an unfair labor practice charge in response to the Respondent's conduct.

[11] Jagels also deleted secs 5.0, 5.4, 5.5, which appear on pages 44–47 of R. Exh. 8, and amended secs 5.1 and 5.6. (Tr. 412–413.)

representative of the RN unit. (GC Exhs. 40 and 41; R. Exh. 12.)

On November 22, 1999, the OPEIU was certified as the exclusive representative of the registered nurses. (GC Exh. 31.) On the same day, the Respondent issued the November 22 memo directly to the bargaining unit employees, without first notifying either the MNA or the OPEIU.[12]

6. OPEIU reacts to the Respondent's conduct

(a) Changes to the flexible benefits plan

On November 23, OPEIU President Kasper wrote to Gatz in response to the November 22 memo, advising her that the OPEIU was the exclusive representative of the RN unit and that the Respondent was prohibited from making unilateral changes to wages, benefits, and terms and conditions of employment. Kasper asked Gatz to contact her regarding the memo and included her work phone number, pager number, cell phone number, and e-mail address in the closing paragraph of the letter.

Gatz never responded. Instead, on November 29, Jagels sent a letter to Kasper indicating that he had received the "letter addressed to Ms. Kathleen Gatz relative to *Crittenton Choice*," and that all future correspondence should be directed to his attention. Jagels also pointed out that his correct title was "Director Human Resources." (GC Exh. 34.)[13]

The next day, November 30, Chief Steward Barbara Chubb filed a grievance protesting the unilateral changes to the flexible benefits plan. (GC Exh. 3.) On December 1, Jagels wrote back stating, "Since there is no contract between OPEIU and Crittenton Hospital I do not know under what authority you file this grievance." (GC Exh. 4; Tr. 37.)

On December 10, 1999, Kasper sent Jagels a letter, which stated:

> As the certified bargaining agent for the nurses, RN Staff Council, OPEIU, AFL–CIO, Local 40, is requesting a list of the employee names, addresses, telephone numbers, a copy of the collective bargaining agreement, tentative agreement and any letters of understanding between Crittenton Hospital and MNA.
>
> I would also like to remind you that there is to be no change in wages, hours benefits or working conditions during this time of transition or before a legal contract has been negotiated and ratified by the nurses.
>
> RN Staff Council, OPEIU, AFL–CIO, Local 40 is looking forward to working with you in our endeavor to negotiate a fair and equitable Collective Bargaining Agreement in the near future. Please forward a number of suggested dates this will be convenient for you and the above requested information within 10 days. [GC Exh. 39.]

On December 21, 1999, Jagels sent a letter (GC Exh. 42) enclosing a copy of the MNA contract. (R. Exhs. 8 and 3.) He also provided a list of nurses' names and addresses, which inadvertently omitted their phone numbers. (GC Exh. 43.)[14] In his letter, Jagels inquired whether Kasper was asking the Respondent to withhold a 2-percent wage increase to which the RNs were entitled in January.[15] (Tr. 416.) Finally, he indicated that the Respondent would be able to meet in late January, but before scheduling a meeting, he wanted the OPEIU to provide the names of its bargaining team. (GC Exh. 42.) On January 27, 2000, Kasper provided the names of the OPEIU bargaining team members and indicated that she would be forwarding dates to begin negotiations. (GC Exh. 38.) Kasper did not provide any dates until late May 2000.

(Tr. 196; R. Exh. 2.)

(b) The discipline of Marie Szczerba

On the same date, November 23, that Kasper wrote to Gatz objecting to the pending changes in the flexible benefits plan, Nurse Marie Szczerba was working in the Hospital's operating room. At about 3 p.m., a registered nurse came on duty, who Szczerba thought had come to relieve her, so she clocked out and went home. A few days later, Operating Room Manager Sharon Lewer told Szczerba that she was going to be disciplined for leaving work without permission on November 23. (Tr. 122–123.)

On November 29, at about 3 p.m., assistant vicepresident of patient care services, Shawn Murphy, told Szczerba to report to Jagels' office for a meeting with Jagels, Lewis and herself. (Tr. 123.) She did not tell her why. (Tr. 547.) Szczerba testified that she told Murphy and Lewis, "Well, I need a Union representative," to which Murphy replied, "No, there is no Union." (Tr. 123.) Murphy confirmed that Szczerba asked for a union representative and did not deny telling Szczerba that there was no union. Rather, Murphy testified that she told Szczeba "We have to go to Mr. Jagels' office to deal with the issues at hand." (Tr. 537.) For demeanor reasons, and in the absence of a specific denial by Murphy, I credit Szczerba's testimony that Murphy told her that there was no union.

Szczerba further stated that when Jagels entered his office, she asked him, "Do I need to have the Union representative?"[16] According to Szczerba, Jagels responded, "There's no contract. There's no one to call. There's no Union." In contrast, Jagels testified that he did not tell Szczerba that she did not have a union or that she did not have union representation. Rather, he stated "I told her there were no Union representatives in the Hospital." (Tr. 469.) Jagels further testified that as of the date of the meeting, November 29, 1999, the OPEIU had not provided him with the names of its local representatives, the implication being that he did not know who to call.

I find Jagels' testimony on this point is implausible. First, Murphy did not corroborate Jagels' testimony about what was

[12] The evidence shows that the Respondent received notification of the certification on November 24, 1999. (Tr. 414.)

[13] Notwithstanding the fact that on November 29 Jagels responded to Kasper's letter, he testified that he did not receive written notice of who he should deal with at the OPEIU until December 6, 1999. (Tr. 415.)

[14] Kasper did not alert Jagels to the fact that the printout deleted the phone numbers. (Tr. 220.)

[15] On January 31, the Hospital implemented a pay increase pursuant to the tentative agreement. (Tr. 416.)

[16] Murphy could not recall whether Szczerba asked again for a union representative in Jagels' office. (537–538.)

discussed in his office. When a party calls a witness who is knowledgeable about a specific set of facts, but fails to elicit testimony from that witness about those facts, I find that it warrants an adverse inference that had Murphy been questioned about the subject matter, her testimony would not have corroborated Jagels' testimony. Also, 6 days earlier, on November 23, Jagels was notified that the OPEIU was the certified exclusive bargaining representative of the registered nurses and on the same date, when Kasper notified Gatz that she was objecting to any changes in terms and conditions of employment, she provided her work phone number, pager number, cell phone number, and e-mail address. (GC Exh. 32.) Ironically, on November 29, the same date as the Szczerba meeting, Jagels responded to Kasper's November 23 letter to Gatz. Thus, contrary to the impression that Jagels sought to foster, the credible evidence shows that he had the information to contact Kasper in response to Szczerba's request for a union representative. His lack of candor taints his overall credibility.[17] For these, and demeanor reasons, I do not credit Jagels' testimony that he did not tell Szczerba that she did not have a union or that she did not have union representation.

During the meeting Szczerba was told that she had left work without permission. Szczerba testified that she explained her version of what occurred and that she asked Jagels to have the nurse who relieved her called to the meeting, along with another nurse who was present, but Jagels refused. According to Szczerba, Jagels told her he had obtained a statement from Ellie Segundo, the nurse who purportedly relieved her. Jagels testified that he told Szczerba that he needed to investigate the matter and that in the interim she was being suspended pending further investigation. (Tr. 124, 468–469.)

Minutes after the meeting ended, Szczerba phoned Union Vice President Melody Kiley to explain what occurred. Kiley told Szczerba to call Union President Vickie Kasper, who upon learning that Szczerba was being disciplined, met with Szczerba at the Hospital. Kasper then called the Respondent's Assistant Vice-President Shawn Murphy, and left a phone message requesting that no further action be taken unless a union representative was present. (Tr. 145.) Jagels returned the phone call to Kasper. When she admonished Jagels for telling Szczerba that she not have union representation, he denied the accusation. Instead, he told Kasper that he told Szczerba that she did not have a union representative at the Hospital. (Tr. 146.)

On December 1, Szczerba returned to work. At the end of her shift, Murphy told Szczerba to report to Jagels' office. Szczerba testified that when she asked Murphy if she should call someone, Murphy shrugged her shoulders and stated, "Who are you going to call? You know, there's nobody." (Tr. 128–129.)[18] When she arrived at Jagels' office, Szczerba told him, "You know, I would like to call the Union." According to Szczerba, Jagels became upset, told her to sit down, and stated, "There's nobody to call. There's no contract. Why. I thought we discussed this before." (Tr. 129.) Jagels told Szczerba that she was being given a final warning in addition to a 3-day suspension. (Tr. 471.)

On December 3 and 6, Kasper and Jagels spoke by phone about his December 1 meeting with Szczerba at which time Jagels told Kasper that he did not know who the OPEIU officers were. On December 6, Kasper sent him a letter providing the names and various phone numbers of the Executive Board Members. She also advised him that until union officers were elected for the Hospital, the Executive Board Members would act as interim stewards. (GC Exh. 35.) Kasper stated "[I] t is our expectation, that Crittenton Hospital will provide these nurses fair representation, by contacting one of the above officer."

On December 10, Jagels replied stating "Should a patient care issue arise and it is in my opinion in the best interest of the Hospital I will not hesitate to immediately suspend the individual pending further investigation of the matter. Absent these circumstances I will acquiesce to your request during this interim period." (GC Exh. 36.) A few days later, Kasper wrote again to Jagels advising him that Melody Kiley was elected vice-president/secretary of Hospital's RN unit and Barbara Chubb was the chief union steward. (Tr. 415.)

(c) Changes in the training requirements for labor and delivery registered nurses

Approximately 20–25 registered nurses worked in Hospital's labor and delivery unit in January 2000. (Tr. 38.) All were required to be certified in neonatal resuscitation.[19] After reviewing the Hospital's policies in anticipation of an audit by the Joint Commission on Accreditation of Hospital Organization (JCAHO), the Respondent determined that the labor and delivery registered nurses were not certified in advance cardiac life support (ACLS). (Tr. 539.) In purportedly an effort to enhance its chances of obtaining JACHO approval, the Hospital decided to require the labor and delivery nurses to become ACLS certified. Clinical Coordinator for Nurse Education Kathy Heniff contacted Jagels to advise him of the new requirement. He testified that he did not notify the OPEIU because he viewed the matter as establishing a Hospital standard, rather than something that had to be negotiated with the union. (Tr. 445.)

On January 19, 2000, a memo was issued to all labor and delivery nurses advising them that they would be required to be ACLS certified. (GC Exh. 5; Tr. 39.) The Hospital offered an ACLS course for registered nurses at no cost. However, if a nurse opted to take the course elsewhere, she would be required to incur the cost. Jagels testified that any nurse who failed to comply with the new requirement would be transferred to another unit if a position was available, or laid-off or terminated if no position was available. (Tr. 446.)[20]

[17] Jagels also equivocated when he was asked if he was aware on November 29 that Kasper was the union president, even though the credible evidence shows that he undoubtedly was aware of that fact. (Tr. 474.)

[18] Jagels recalled the meeting taking place on December 2, but conceded that it could have taken place on December 1.

[19] The evidence shows that this certification requirement was a negotiated term that was made part of the latest MNA contract. (See R. Exh. 27, p. 59.)

[20] Although some labor and delivery nurses resisted taking the course at first, all who were scheduled to take the class, eventually did so. (Tr. 53, 542.)

Chief Union Steward Chubb testified that she asked Heniff to arrange a meeting between the local OPEIU officers and the Respondent's managers who decided to impose the ACLS certification requirement to discuss the new requirement, but Heniff declined to meet with the union. (Tr. 52–53.)

On February 23, 2000, Chubb wrote to the Respondent's Assistant Vice-President Shawn Murphy asking her to clarify why the qualifications were being changed and asking for a copy of any documentation to support the change. (GC Exh. 6.) Chubb also stated that the OPEIU "reserved[d] the right to bargain on the issue." On March 8, Jagels responded to the Chubb's letter stating that the new certification requirement would remain as stated and that it was changed as the result of the Hospital's "Conscious Sedation" policy, a copy of which was later provided to Chubb. (GC Exh. 7.)

(d) The relocation of the pediatrics unit and related mandatory cross-training

Up until June 2000, the Respondent's pediatric unit was located on the fourth floor of the Hospital and the medical/surgical unit was located on the sixth floor. None of the registered nurses in each unit were required to be cross-trained to work in the other's unit. (Tr. 60.) As explained by Assistant Vice President Shawn Murphy, a decision was made to close the pediatric unit and combine it with the medical surgical unit because the pediatric unit was extremely small and it was located in a remote part of the hospital, which raised safety and security concerns. (Tr. 542.) The relocation was scheduled to take place on June 19.

On June 7, the Respondent's managers met to coordinate the relocation of the pediatric unit to the sixth floor with the medical/surgical unit. The group also outlined a process for cross-training pediatric nurses and medical/surgical nurses to do each other's work. (GC Exh. 11.) A management memo, dated June 7, summarizing the steps discussed at the meeting to implement the move, stated:

> Peds staff will be sent to 6E for preceptoring for 2 days in next two weeks, and designated 6E nurses who will cross train for pediatric nurses and all 6E staff will take designated pediatric CBE as determined by Kathy Heniff. Kathy is also providing a booklet to the 6E nurses with basic information on Peds nursing.

(GC Exh. 11.)

On June 13, 2000, Kasper wrote to Jagels stating that she had heard that the Respondent was making unilateral changes in the pediatric department without notifying the OPEIU. (GC Exh. 53.) The June 13 letter, in pertinent part, states:

> Staff nurses have also informed me Crittenton is making unilateral changes in the Pediatric Department without notifying the Union. I have also been made aware that you are forcing nurses to work beyond their designated shifts. This is a very dangerous practice. The community of Rochester should have safe nursing care provided to them. If you feel you cannot properly and safely staff your hospital the union will work with you to help you resolve thisA communication was sent to you with various dates to begin negotiations. The Local has not received an answer to this. Do you have any dates you would like to offer? Please contact me via facsimile with your responses as soon as possible. The Respondent nevertheless combined the two units as scheduled.

(e) The request for information concerning grievances in general

By letter, dated December 2, 1999, Labor Counsel for the MNA, Kathyrn Martel, wrote to the then attorney for the OPEIU, Melvin Schwarzwald, asking if the OPEIU was going to assume responsibility for several pending arbitrations and grievances. (GC Exh. 45, page 2.) Schwarzwald apparently did not respond to the letter. At some point later, the OPEIU retained other counsel, namely, Scott A. Brooks, Esquire.

On February 7, 2000, the Respondent's counsel, Lawrence F. Raniszeski, Esquire, wrote to Brooks enclosing a copy of Martel's December 2 letter, and inquiring "as to whether OPEIU intends to assume any of the cases" identified in the letter. (GC Exh. 45.) On February 14, Raniszeski again wrote to Brooks stating that because the Respondent had not received a response from the Union, it was rescheduling its meeting with the MNA, but urged the OPEIU to make known whether it intended to assume the grievances. (GC Exh. 46.) Three days later, on February 17, Brooks replied that the OPEIU viewed the meeting with MNA as illegal and that it could be perceived as an attempt to undermine the OPEIU. He also stated that the OPEIU had not responded to the letters because the Respondent has not responded to Kasper's written request, dated February 2, 2000, for information pertaining to the grievances. (GC Exh. 47.) On February 23, Raniszeski wrote back pointing out that under *Arizona Portland Cement Co.*, 302 NLRB 36 (1991), the Respondent had an obligation to meet with the MNA, that the OPEIU did not have a right to be present at a meeting concerning grievances filed prior to certification, and that the Respondent had no obligation to provide information concerning those grievances to the OPEIU. (GC Exh. 50.)

(f) Request for information concerning the discipline of Nurse Adelaida Cruz

Also in February 2000, Jagels advised Nurse Adelaida Cruz that the Hospital was investigating an allegation that she had engaged in disruptive conduct in a patient care area, which could result in progressive discipline. (GC Exh. 12.) On February 24, Union Steward Barbara Chubb wrote to Jagels asking him to delay until March 16, an investigatory meeting scheduled for February 28, in order for the union to obtain information to adequately represent Cruz. Chubb specifically asked for various documents including, but not limited to, Cruz' personnel file. (GC Exh. 13.) Jagels declined to postpone the meeting.

On February 28, Cruz was discharged for excessive absenteeism.[21] Chubb was present at the discharge meeting. She testified that when she asked Jagels if he would provide the information requested, he responded that it was irrelevant, although he did provide her with a copy of the discharge notice. (Tr. 72, 455.) The next day, Chubb filed a grievance protesting

[21] The evidence shows that around the same time, the Michigan Nurses Association was representing Cruz in connection with a 3-day suspension she received in October 1999.

the discharge of Cruz (GC Exh. 17), which was followed by another letter, dated March 1, asking Jagels to explain in writing why he would not release the information. On March 2, Jagels responded by stating that there was no contract between the union and the Respondent. He also stated that Hospital policy, "governing statutes and laws of the State of Michigan" prohibit the release of the information requested without an appropriate release authorization.[22] (Tr. 110.) Jagels stated that if Chubb obtained an appropriate release from Cruz, he would provide the personnel file and the documents relied upon by Hospital in disciplining Cruz. Jagels refused to provide the absenteeism records or disciplinary records of all bargaining unit employees for past three years. (GC Exh. 19; Tr. 111.) When Chubb provided an authorization signed by Cruz, Jagels provided Cruz' personnel file (Tr. 118), which contained the prior discipline she had received as a Hospital employee.

Sometime in April 2000, Kasper wrote to Jagels requesting information pertaining to a prior grievance concerning Cruz, who already had been terminated allegedly for misuse of sick leave. (Tr. 167; GC Exh. 51.) Kasper sought, among other things, all computer and time card records for bargaining unit members since January 1, 1999, showing their "shifts/days/dates absent and shift/days/dates they cancelled out." (GC Exh. 51.) On April 18, Jagels provided all of the information requested except the information pertaining to the bargaining unit members, which he stated was irrelevant to the Cruz grievance and had no bearing on the Respondent's action. (Tr. 169; GC Exh. 52.)

On April 24, Chubb sent Jagels a request for more information pertaining to Cruz. (GC Exh. 20.) Specifically, she sought records relating to disciplinary action taken against Cruz in 1994, the file of a supervisory registered nurse, which purportedly contained information on Cruz, and a copy of the Hospital's 1994 corrective action policy. (GC Exh. 20.) On May 10, Chubb repeated her request for the information sought in her April 24 letter and, in addition, she asked for a list of all RNs terminated and hired since December 21, 1999. (GC Exh. 21.)

On May 10, Jagels responded to Chubb's request by providing information pertaining to Cruz' 3-day October 1999 suspension. He refused to provide the manager's file and any legal correspondence pertaining to Cruz. Jagels also advised Chubb that he was unaware of any investigative material. (GC Exh. 22.) On May 26, Chubb wrote pointing out to Jagels that the 3-day suspension was factored into the decision to discharge Cruz on February 28, and therefore it was relevant. She also pointed out that a February 16 memo indicated that an investigation of Cruz was underway and she insisted that he provide the manager's files. (GC Exh. 24.) In early October 2000, the information pertaining to Cruz' 3-day suspension was provided by the Hospital. (GC Exh. 23.)

(g) Request for information pertaining to parking tickets

In March 2000, Chubb sought to investigate a parking problem that the RNs working the afternoon shift were experiencing. Some nurses, concerned about after hour security, had received parking tickets for parking too close to the Hospital, rather than in a more remote area designated for employee parking. Chubb contemplated filing a class action grievance. She wrote to Jagels requesting detailed information about parking tickets issued to employees within the last two years. (GC Exh. 25.) Although Chubb testified that she did not receive a response from Jagels (Tr. 86), the evidence shows that he responded on March 24, by declining to provide the information requested. (R. Exh. 11.)

(h) Request for updated lists of registered nurses

On May 10 and July 13, 2000, Chubb wrote Jagels asking for lists of all RNs, their current hourly wage, and dates of employment. (GC 21 and 27.) On July 21, Jagels provided the information requested, except the names of the terminated employees and the new hires addresses. (GC Exh. 28; Tr. 90.)

On July 21, 2000, Kasper requested an updated list of RN telephone numbers and addresses since December 21, and the names, addresses, and phone numbers of any nurse hired since that time. (Tr. 226; GCExh. 54.) Kasper repeated her requested again on July 24 (GC Exh. 55), and August 26 (GC Exh. 56). She testified that OPEIU did not receive the information (Tr. 173), but the evidence shows that it was provided on October 11, after the union filed an unfair labor practice charge. (GC Exh. 57 & 58.)

(i) Information request pertaining to grievances of Lisa Lockwood and Kevin Shane

On July 17, 2000, Chubb wrote to Jagels requesting the investigation reports concerning separate incidents involving two nurses. (GC Exh. 29.) Chubb followed up the request with another letter, dated July 31, but never received a response to either request. (Tr. 92; GC Exh. 31.)

D. Analysis and Findings

1. Deferral under *Collyer*[23] is inappropriate

In *United Technologies Corp.*, 268 NLRB 557 (1984), the Board revived the "deferral to arbitration policy expressed in *Collyer Insulated Wire*, stating that deferral is appropriate when the following criteria are present: the dispute arose within the confines of a long and productive collective-bargaining relationship; there is no claim of employer animosity to the employees' exercise of protected rights; the parties' contract provided for arbitration in a very broad range of disputes; the arbitration clause clearly encompasses the dispute at issue; the employer has asserted its willingness to utilize arbitration to resolve the dispute; and the dispute is eminently well-suited to such resolution. *United Technologies*, 268 NLRB at 558; *Tri-Pak Machinery, Inc.*, 325 NLRB 671, 672 (1998).

With respect to the allegations that the Respondent unilaterally made changes to the flexible benefits plan without notifying and bargaining with the SEIU (LPN), RCMLEA, and RCREA, the Respondent argues that the matter should be deferred to the grievance/arbitration procedures contained in the respective prior collective-bargaining agreements, which were

[22] Chubb testified that at the time she filed the grievance, she was aware that it was Hospital policy that personnel files were confidential and could not be produced without a signed authorization from the employee. (Tr. 107.)

[23] *Collyer Insulated Wire*, 192 NLRB 837 (1971).

extended, in part, by mutual agreement of the parties.[24] I find that deferral is inappropriate.

First, the matter falls outside the scope of the contractual grievance procedures. Each of the prior contracts that was extended in part by mutual agreement of the parties states "grievances are limited to matters of interpretation or application of the terms of this contract." (LPN: GC Exh. 72 p. 4; RCMLEA: GC Exh. 63 p. 8; RCREA: GC Exh. 60 p. 5.)[25] The undisputed evidence shows, however, none of these unions signed a final and binding collective-bargaining agreement with the Respondent because in every negotiation a dispute arose over the proper language to be included in the contract concerning the flexible benefits plan. In other words, there is no term or provision to interpret or apply because the parties never reached an agreement on the language for that term or provision.

Next, the matter falls outside the scope of the arbitrator's power under the contractual grievance procedures. Each of the prior contracts that was extended in part by mutual agreement of the parties states "The arbitrator shall have no power to add to or subtract from or modify any of the terms of this Agreement or any supplement or amendment thereto." (LPN: GC Exh. 72, page 6; RCMLEA: GC Exh. 63, page 10; RCREA: GC Exh. 60, page 7.) Because there is a dispute over the language to be included in the final collective-bargaining agreements, the parties essentially would be asking the arbitrator to write, not interpret, a provision of the contract, which they were unable to reduce to writing themselves.

Further, although the Respondent requests in various footnotes that the matter be deferred to the grievance/arbitration procedures contained in the prior collective-bargaining agreements, it does not explain how the *Collyer* criteria has been met. Rather, the Respondent implies that the language in the signed tentative agreements,[26] which generally states that the respective bargaining unit employees will be enrolled in the Hospital Flexible Benefit Program is the language that should be deferred to the grievance/arbitration procedures for interpretation.[27] The argument is unpersuasive because it ignores the fact that there is, and always has been, a dispute between the various unions and the Respondent over the language to be included in a final collective-bargaining contract. It also ignores the fact that the dispute over language has precluded the parties from signing finalized collective-bargaining agreements. In essence the Respondent's position would require the arbitrator to first determine the language to be included in the final contract and then interpret it.

Finally, the issue here is not whether the bargaining unit employees are required to be enrolled in the flexible benefits plan. There is no dispute that the unions agreed to enroll their members in the flexible benefits plans and the undisputed evidence shows that enrollment has occurred. The issue here is whether the Respondent had the right to unilaterally make changes to the flexible benefits plan, and in that connection, there is no agreed upon contractual language which addresses the issue.

For these reasons, I find that this case is not well suited for deferral under *Collyer,* and to do so would be inappropriate.[28]

2. Violations pertaining to the RCREA, RCMLEA, and SEIU LPN

(a) Unlawful unilateral changes to the flexible benefits plan

An employer violates Section 8(a)(5) of the Act when it institutes changes in terms and conditions of employment without first consulting the employee collective-bargaining representative and giving it an opportunity to bargain about the changes. *NLRB v. Katz,* 369 U.S. 736 (1962). It is undisputed that health insurance benefits are terms and conditions of employment and, therefore, they constitute a mandatory subject of bargaining. *Pioneer Press,* 297 NLRB 972, 976 (1990).

The evidence shows that through separate negotiations with the Respondent, the RCREA, RCMLEA, and SEIU (LPN) agreed in separate signed tentative agreements to enroll the respective bargaining unit employees in the Respondent's flexible health benefits plan, and that all of the bargaining unit members were enrolled in that plan. The evidence further shows although none of the negotiations culminated in a signed final written agreement, because of a dispute over the appropriate language to be placed in the final contract concerning the flexible health benefits plan,[29] the Respondent on January 1, 1999, implemented the flexible benefits plan at no increased cost to the unionized employees,[30] and that all of the parties continued to adhere to all other terms of their expired collective-bargaining agreements as modified by the signed tentative agreement. Thus, the undisputed evidence shows that in the absence of a signed finalized collective-bargaining agreement, the flexible benefits plan became a term and condition of employment by mutual assent of the parties, which the Respondent was not at liberty to change unilaterally without bargaining

[24] Respondent's posthearing brief, p. 55, fn. 26; p. 67; fn. 31; and p. 72, fn. 33. A similar request for deferral was made with respect to the allegations asserted on behalf of the SEIU Tech unit; however, because that allegation has been found to be time-barred by Sec. 10(b), the deferral issue is moot.

[25] The evidence shows that the respective ratified tentative agreements modified only a very limited number of provisions of the respective prior collective-bargaining agreements, and that the parties extended and adhered to the terms of their prior collective-bargaining agreement as modified by the ratified tentative agreement, notwithstanding the dispute over the specific language concerning the flexible benefits plan to be included in the final contract.

[26] (GC Exh. 61-A, 64 and 77.)

[27] See, e.g., Respondent's posthearing brief at p. 53.

[28] In addition, I find that although the Respondent has requested deferral to arbitration, it has not stated anywhere, that it is willing to waive any contractual time limitations. *Hallmor, Inc.,* 327 NLRB 292, 293 (1998). Not in its answers, not in its opening statement at trial, and not in its posthearing brief. Thus, even if there was agreed upon language for an arbitrator to interpret, the Respondent has not satisfied a critical requirement for deferral.

[29] The SEIU LPN language dispute involved the deletion of two provisions from the final draft of the renewal contract, which were contained in the expired LPN contract.

[30] There is no dispute that the Respondent provided enough flex dollars to cover the cost of flexible benefits from January 1 – December 31, 1999, and even longer for some bargaining unit employees, like SEIU LPNs.

with the Union. *Wire Products Mfg. Corp.*, 329 NLRB 155, 165 (1999).

The Respondent argues, however, that under the terms of the signed tentative agreements, it had the implied right to change benefits and pass along cost increases to the unionized employees because the unions did not include language in the tentative agreements, which prohibited it from doing so. The argument is unpersuasive. Under Board law, "it is well settled that even if a collective-bargaining agreement does not refer to a particular set of employment conditions, in a unit represented by a union, an employer may not unilaterally change existing terms and conditions of employment. The right to be consulted about changes in existing terms and conditions of employment is a right given by statute and not one obtained by a contract." *Suffolk Child Development Center*, 277 NLRB 1345, 1349 (1985), citing *NLRB v. C.C. Plywood Corp.*, 385 U.S. 421, 423, 428, 430–431 (1967). Here, there are no finalized collective-bargaining agreements, and the signed tentative agreements only state that the unionized employees will enroll in the flexible benefits plan, which they did. I find that under the Act the Respondent could not change the flexible benefits plan as originally implemented without consulting with the unions about those changes. Accordingly, I find that Respondent violated Section 8(a)(5) of the Act by unilaterally making changes to the flexible benefits plan affecting the RCREA, RCMLEA, and SEIU LPN bargaining unit employees, which became effective on January 1, 2000.

(b) The lack of contractual authority to make unilateral changes

The Respondent argues that the unions did not insist, nor do the tentative agreements contain, any language prohibiting it from making changes to the flexible benefits plan during the contract term. While that is true, the evidence shows that the Respondent, who submitted the flexible benefits plan proposal, did not include any language reserving the right to make such changes. Indeed, there is no language in any of the tentative agreements showing that the Respondent reserved the right to change benefits or assess increased costs to the bargaining unit employees during the contract term.

In contrast, the evidence shows that where the Respondent intended to limit its financial obligation to pay for benefits, it expressly stated so in the tentative agreement. For example, the flexible benefit proposal prepared by the Respondent for the LPN tentative agreement unequivocally states:

> All LPN's enrolled in the Crittenton Hospital Flexible Benefit Program. The employer agrees to pay up to a maximum aggregate of $1500.00 for health care costs incurred by bargaining unit members for the period January 1, 1999 through ratification. Documented costs must be presented to the employer within sixty days after ratification.

(GC Exh. 77.)

The Respondent also argues in connection with the LNP negotiations that the union unsuccessfully attempted three times to insert language in the tentative agreement limiting the Respondent's right to change benefits.[31] (Tr. 439–440.) The evidence shows that under Section 5.5 of the prior contract the Respondent reserved the right to change health insurance carriers: "The Hospital shall select or change the insurance carrier under this Article or be self-insured in its discretion, and shall be entitled to receive any dividends, refunds or rebates earned without condition or limit of any kind." (GC Exh. 71, page 36, Section 5.5, second paragraph.) The credible evidence further shows that the union submitted a proposal seeking to modify that section by requiring the Respondent to notify the union before changing to another carrier. (Tr. 360–362.) Thus, contrary to the Respondent's assertions, the proposals sought to limit the Respondent's right to change carriers, not benefits, and there is no evidence in the prior contract or tentative agreement indicating that the Respondent expressly reserved the right to change benefits or costs associated with the flexible benefits plan.

The Respondent implies that it has a derived right to unilaterally change terms and conditions under the terms of the actual flexible benefits plan. The actual plan summary was not submitted into evidence. Even if the actual plan summary was in evidence, the tentative agreements do not incorporate by reference the actual plan terms. Cf. *Midwest Power Systems, Inc.*, 335 NLRB 237, 238 (2001). Thus, there is no evidence to support a reasonable inference that such a right is derived from the plan summary itself.

Further, none of the other documents that the Respondent distributed to the bargaining unit employees at the time of ratification indicate that they would have to share costs without an opportunity to bargain. In a letter to the RCMLEA unit employees, welcoming them to the flexible benefits plan, the Respondent stated:

> Your current medical, dental, and vision enrollments will remain the same. The amount of your payroll deduction for medical and/or dental coverage will not change. Flexible benefit deductions are taken each pay period. [R. Exh. 28, p. 1.]

The Respondent also distributed a 1999 Enrollment Workbook specifically prepared for the bargaining unit employees (R. Exh. 28), which described those eligible as:

> Contractual employee in the following bargaining groups: Licensed Practical Nurses (LPN), Laboratory Technicians/Technologists (LAB), and Service Employees (SEIU). (R. Exh. 28, Enrollment Work book p. 1.)

Nowhere does the workbook state that flex dollars may not be enough to cover medical expenses; that bargaining unit employees might have to cover cost increases through higher payroll deductions; or that changes may occur without collective-bargaining. To the contrary, the Respondent acknowledges that its right to make unilateral changes is subject to bargaining at

[31] The Respondent also argues that the unions should have known that the unit employees would have to share cost increases because in past years the nonunionized employees have had to share cost increases and they have had their benefits changed. That argument falls short since the nonunionized employees have neither statutory nor contractual protection against such unilateral acts by the Respondent.

the very end of the workbook, where it states that "Crittenton Hospital reserves the right to amend or terminate the benefits described in this guide in whole or in part at any time and for any reason," but also states that "Some benefits described in this booklet are subject to collective bargaining agreements."

In contrast, on November 22, 1999, when the Respondent announced the unilateral changes in the flexible benefits plan, it issued a revised Enrollment Workbook that was geared to both nonunion and unionized employees, and which specifically stated that the employees might be required to share in the cost of benefits:

> With *CrittenChoice*, you will receive a set amount of Flex Dollars every year at enrollment time. These Flex Dollars are Crittenton's contribution toward the cost of your benefits. You use them to help purchase the benefits and the level of coverage you want for you and your family.
>
> Depending on the benefits and coverage levels you choose, your Flex Dollars might be enough to cover the "price tag" attached to the benefit, or you may need to pay for the rest with before-tax (and, in some cases, after-tax) dollars deducted from your pay.

(GC Exh. 2, 2000 Enrollment Workbook, page 3.)

Thus, the evidence shows that only after it announced the changes to the flexible benefits plan in November 1999, did the Respondent insert language in its workbook advising the employees that they would have to share in the cost of benefits.

In addition, the credible evidence shows that during negotiations, Jagels told each of the bargaining teams that sufficient flex dollars would be provided to cover the cost of benefits. Although he might have stated that costs could increase in the future, and that the bargaining unit employees might have to share in those costs, there is no credible evidence that he specifically told them that this would take place during the term of the contract. Rather, during the employee meetings held to explain the flexible benefits plan, the bargaining unit employees were told that the cost to the them of an equivalent level of benefits would not increase during the contract term and that changes in benefits would have to be negotiated at the end of the contract term.

Finally, the past practice of the parties makes it unlikely that all three unions would agree to enroll their members in the flexible benefits plan without some assurance that they would not incur any cost increases and that benefits would not be changed during the contract term. The undisputed evidence shows that for years the unions were adamantly opposed to enrolling their members in the flexible benefits plan. RCREA Secretary Christine Binkowski credibly testified that the bargaining unit employees were concerned that "the benefits would change, that the cost incurred to employees would change, that enough money would not be provided to buy the same coverage that we have." (Tr. 245.) It is implausible that all three unions would capitulate to the Respondent's demand without obtaining some assurance that the same coverage would be provided at no cost to the employees during the contract term.

Thus, I find there was no contractual support, expressed or implied, for the Respondent's position that it had the right to make unilateral changes to the flexible benefits plan in accordance with the tentative agreements or the actual plan summery itself.

(c) No waiver of the right to bargain

The Respondent argues that the Act was not violated in any event because the unions waived their right to bargain. Relying on *Gratiot Community Hospital v. NLRB*, 51 F.3d 1255, 1259 (6th Cir. 1995), it asserts that the unions received adequate notice of the change, but failed to request bargaining on the issue. In *Gratiot*, the Sixth Circuit stated that "actual notice is sufficient to notify union representatives of a change in conditions or terms of employment."[32] The Respondent argues that although the November 22 memo was sent directly to the employees informing them of changes to the flexible benefits plan, the unions found out about the November 22 memo indirectly from their respective members. Thus, the Respondent asserts that the RCREA, RCMLEA, or SEIU LPN waived the right to bargain because after receiving actual notice of the changes, they never made a request to bargain.

Gratiot also held, however, that a waiver must be clear and unmistakable. It must be a "conscious relinquishment" of the right to bargain. The Court stated that a union cannot be held to have waived bargaining over a change which is presented as a *fait accompli*. If a change is implemented too quickly after notice is given, *or an employer had no intention of changing its mind*, the notice constitutes nothing more than a *fait accompli*, which is not the sort of timely notice upon which the waiver defense is predicated. See also, *Gulf States Mfg v. NLRB*, 704 F.2d 1390 (5th Cir. 1983); *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013 (1982). The evidence shows that the November 22 memo informed the employees in definite terms that "there will be some changes to reflect the increasing cost of medical care" and that "all medical options will have a $10 drug co-payment per prescription for generic drugs and a $20 co-payment per prescription for brand name drugs" and that "Employee medical contributions also will increase between $4 and $15 a pay period depending upon the option you choose and the coverage that you elect." (GC Exh. 2.) There is nothing tentative or preliminary about the memo's language, which pronounces that a final decision had been made.

Moreover, the evidence shows that the Respondent's position, then and now, is that there was nothing to bargain over. As Jagels testified, and as the Respondent argues in its posthearing brief, it had no duty to bargain over the unilateral changes because by signing the tentative agreements enrolling the bargaining unit employees in the flexible benefits plan the unions acknowledged that the Respondent had the right to change benefits and costs. [33]

[32] The present case arises in the Sixth Circuit.

[33] As noted above, the Respondent's position is unpersuasive, since none of the signed tentative agreements incorporate by reference the terms and conditions of the flexible benefits plan into the contract. Nor does the evidence show that the terms of the actual flexible benefits plan give the Respondent the right to assess costs to the bargaining unit employees or change their benefits. Even the Enrollment Workbooks

Likewise, when the RCMLEA sought to file a grievance in order reconcile the dispute over the language to be included in the finalized contract concerning the flexible benefits plan, the Respondent took the position that there was no grievance because by ratifying the tentative agreement the membership accepted its language as final. I find that the evidence, as a whole, supports a reasonable inference that the Respondent by its words and conduct had no intention of changing its mind about implementing the changes outlined in the November 22 memo, even if the unions had sought to bargain.

(d) Unlawful direct dealing

The consolidated complaints allege that the Respondent violated Section 8(a)(1) and (5) of the Act by dealing directly with the bargaining unit employees represented by the RCREA, RCMLEA, and SEIU LPN, when it issued the November 22, 1999 memo to them and required them to respond by December 3, 1999. In *Southern California Gas Co.*, 316 NLRB 979 (1995), the Board enumerated the following criteria to be applied in determining whether the Respondent has engaged in direct dealing: (1) that the employer was communicating directly with union-represented employees; (2) the discussion was for the purpose of establishing or changing wages, hours, and terms and conditions of employment or undercutting the union's role in bargaining; and (3) such communication was made to the exclusion of the union. *Permanente Medical Group*, 332 NLRB 1143, 1144 (2000).

Applying this test, the undisputed evidence shows that the November 22, 1999 memo was distributed directly to the bargaining unit employees, that it contained information outlying changes to terms and conditions of employment and the memo was not provided to any of the unions; rather, the unions found out about the memo from their members after it was distributed. Accordingly, I find that the Respondent violated Section 8(a)(5) of the Act by direct dealing with the bargaining unit employees as alleged in paragraphs 11 in Cases 7–CA–43068(1) and 7–CA–43068(2) and in paragraph 18 in Case 7–CA–42979.

(e) Unlawful deletion of article 7, sections 3.13 and article 14, section 5.9 and refusal to execute the contract

Paragraph 14–16 of the amended complaint in Case 7–CA–42979 alleges that in February 1999, the Respondent unlawfully deleted from the final draft of the renewal collective-bargaining agreement with the SEIU LPN, two provisions contained in their 1992–1995 collective-bargaining agreement, to wit: article 7, section 3.14 and article 14, section 5.9. These provisions concern the payment of health insurance premiums by the Respondent on behalf of LPN unit employees during their layoff and/or authorized leave of absence. It is further alleged that the Respondent failed and refused to reinsert the provisions and to execute the final contract with the SEIU LPN. The Respondent asserts that it deleted the provisions because the parties had agreed in a tentative agreement to enroll the bargaining unit members in the flexible benefits plan. In addition, the Respondent argues that in any event the SEIU LPN never requested to bargain and therefore it waived its right to bargain over the matter. The Respondent's argument is unconvincing.

The disputed provisions concern the Respondent's obligation to pay health insurance premiums for employees on layoff or leave of absence.

> Article 7, *Section 3.13* states: Except for employees who take permanent employment elsewhere, the Hospital will make two (2) monthly contributions for Blue Cross/Blue Shield, MVF-1 insurance (hospital-medical-surgical) or its equivalent or an HMO plan for laid-off employees who are covered by such insurance at the time of layoff. [GC Exh. 71, p. 14.]
>
> Article 14, *Section 5.9* states: When employment is interrupted by layoff, leaves of absence or other reasons not involving loss of seniority, all group insurance coverage continues for thirty (30) days following the day when such interruption occurs and for the balance of the month in which the thirtieth (30th) day occurs. When employment and seniority is terminated, all insurance coverage continues only for the balance of the month in which such termination occurs or until the next premium is due, whichever is later.
>
> Except for employees who take permanent employment elsewhere, the Hospital will make two (2) monthly contributions for Blue Cross/Blue Shield MVF-1 insurance (hospital-medical-surgical) or its equivalent or an HMO plan for laid off employees who are covered by such insurance at time of layoff. [GC Exh. 71, pp. 37–38.]

There is no evidence, however, that the parties ever discussed article 7, section 3.13 or article 14, section 5.9 at any time during the negotiations. Nor does the SEIU LPN tentative agreement, upon which the Respondent solely relies, contain any language addressing or acknowledging that those provisions should be deleted.

In addition, the Respondent has not adequately explained why it was necessary to delete those provisions. The evidence shows that a Blue Cross/Blue Shield provider was available to the bargaining unit employees transferring to the flexible benefits plan. (R. Exh. 28, Enrollment Workbook, pp. 1 and 3.) The evidence also shows that similar provisions were not deleted from the signed finalized SEIU Tech agreement. (GC Exh. 73, p. 37.) A similar provision likewise remained in the MNA finalized contract, which was never signed because of a dispute over the flexible benefits language. (R. Exh. 27, p. 32, sec. 5.1.) Thus, there is no support for the Respondent's assertion that the deletions were required by the implementation of the flexible benefits plan.

Nor does the credible evidence support the Respondent's argument that the SEIU LPN was required to request bargaining and failed to do so. The evidence shows that in June 1999, the Union ratified the tentative agreement reached by the parties effectuating a handful of amendments to the prior contract, which remained in effect. (Tr. 330; GC Exh. 77.) The Respondent took over 7 months to produce a finalized collective bargaining agreement for signing, and in the interim "lined-out"

---

which state that the Respondent can amend or terminate benefits, acknowledge that some of the benefits are subject to collective-bargaining agreements, which supports a reasonable inference that they cannot be changed without notice and an opportunity to bargain.

much of the language of the prior contract, including the disputed provisions, which were never discussed during negotiations. I find that the union was not required to request bargaining to have the omitted language reinserted. Bargaining had concluded 7 months earlier.

In any event, the evidence shows that the SEIU LPN Business Representative, Ella Hainor and Patricia Marich, sought to meet and discuss the deletions with Jagels. The SEIU LPN even filed a grievance over the matter. Ultimately, Marich and Hainor were confronted with the same response that Jagels gave concerning all disputes over the flexible benefits plan, i.e., "The acceptance of Flexible Benefits by the LPNs as reflected in the Tentative Agreement negates the grievance in question and the grievance is denied." (GC Exh. 74, 75, 78 and 79.)

I further find that the union was presented with a fait accompli, when the Respondent deleted the provisions, refused to reinsert them, and refused to execute a finalized collective-bargaining agreement containing the section 3.13 and section 5.9. See *Eldorado, Inc.*, 335 NLRB 952, 954 (2001).

Accordingly, I find that the Respondent violated Section 8(a)(5) of the Act by deleting the above-reference provisions from the SEIU LPN finalized contract, refusing to reinsert them, and by refusing to execute a final collective-bargaining agreement containing those provisions.

3. Violations pertaining to the OPEIU

(a) The 8(a)(5) violations

(1) Unlawful unilateral changes

Paragraphs 9 and 10 of the third amended consolidated complaint in Case 7–CA–42695, et al. alleges that the Respondent violated Section 8(a)(5) of the Act on November 22, 1999, by announcing and subsequently implementing changes to the flexible benefits plan without prior notification to the OPEIU, without affording the union the opportunity to bargain and by direct dealing with the bargaining unit employees.

Section 8(d) requires an employer to bargain over "wages, hours, and other terms and conditions of employment." 29 U.S.C. §158(d). As noted above, it is undisputed that health insurance benefits are terms and conditions of employment and, therefore, they constitute a mandatory subject of bargaining. *Pioneer Press*, 297 NLRB 972, 976 (1990). An employer violates Section 8(a)(5) if, without bargaining to impasse, it effects a unilateral change of an existing term or condition of employment, *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991). This is particularly true when the unilateral changes are implemented following a new union's certification, *Adair Standish Corp. v. NLRB*, 912 F.2d 854, 863–864 (6th Cir. 1990); see *Daily News of Los Angeles*, 315 NLRB 1236, 1237–1238, enfd. 73 F.3d 406 (D.C. Cir. 1996), cert. denied 519 U.S. 1090 (1997), because by unilaterally changing the employees' terms and conditions of employment, an employer "minimizes the influence of organized bargaining" and "emphasiz[es] to the employees that there is no necessity for a collective bargaining agent." *May Dept. Stores Co. v. NLRB*, 326 U.S. 376, 385 (1945).

The evidence shows that on November 23, 1999, OPEIU President Vicki Kasper sent a letter to Assistant Vice-President Gatz objecting to the unilateral changes announced in the November 22 memo. On December 10, she sent a letter to Human Resources Director Jagels stating that "there is to be no change in wages, hours, benefits or working conditions during this time of transition or before a legal contract has been negotiated and ratified by the nurses." (GC Exh. 39.) It also states that the OPEIU "is looking forward to working with you in our endeavor to negotiate a fair and equitable Collective Bargaining Agreement in the near future. Please forward a number of suggested dates that will be convenient for you." The December 10 letter also sought pertinent information necessary for the OPEIU to carry out its responsibility as the exclusive collective bargaining representative.

Under Board law, "a valid request to bargain need not be made in any particular form, or in haec verba, so long as the request clearly indicates a desire to negotiate and bargain on behalf of the employees in the appropriate unit concerning wages, hours, and other terms and conditions of employment." *Marysville Travelodge*, 233 NLRB 527, 532 (1977) (quoting *Al Landers Dump Truck, Inc.*, 192 NLRB 207, 208 (1971), enfd. sub nom. *NLRB v. Confer*, 637 F.2d 1309 (9th Cir. 1981). The Board has also stated that a request for information is tantamount to a request for bargaining. See, e.g., *Specialty Envelope Co.*, 321 NLRB 828, 830 (1996), enfd. sub nom. in relevant part *Peters v. NLRB*, 153 F.3d 289, 298–299 (6th Cir. 1998). Thus, the evidence shows, and I find, that Kasper's letters constitute a demand for bargaining, which the Respondent ignored by unilaterally implementing the changes to the flexible benefits plan on January 1, 2000. The fact that the parties did not actually schedule dates for negotiations until May 2000 does not alter the Respondent's duty to maintain the status quo until negotiations commenced and resulted in final agreement or impasse.

Accordingly, I find that the Respondent violated Section 8(a)(5) of the Act on November 22, 1999, and thereafter on January 1, 2000, by unilaterally changing the terms and conditions of the flexible benefits plan of the bargaining unit employees represented by the OPEIU.

(2) Unlawful direct dealing

Applying the test enunciated by the Board in *Southern California Gas Co.*, supra, the evidence shows that the Respondent communicated directly with the bargaining unit employees about changes it would make to terms and conditions of the flexible benefits plan and that the communication was made to the exclusion of the exclusive bargaining representative. The Respondent argues that the Act was not violated because it was not notified that the OPEIU was the certified bargaining representative until two days after it announced the changes to the registered nurses. The argument is unpersuasive because the evidence viewed as a whole shows that even if it had been notified prior to November 22 that the OPEIU was the exclusive bargaining representative, the Respondent would not have contacted the Union prior to issuing the November 22 memo. The evidence shows that the Respondent did not notify the MNA or any of the other unions of the pending unilateral changes. Moreover, even after the Respondent learned that the OPEIU was the certified representative, and even after the OPEIU re-

quested to bargain over the changes, the Respondent proceeded to implement those changes as announced. In other words, whether the Respondent knew before or after November 22 about the OPEIU's certification would not have altered its course of conduct in any way, shape or form.

Accordingly, I find that the Respondent violated Section 8(a)(5) of the Act by dealing directly with the employees represented by the OPEIU.

(3) Unlawful unilateral requirement of ACLS certification

Paragraphs 11–13 of the OPEIU amended consolidated complaint alleges that in January 2000, the Respondent unlawfully violated Section 8(a)(5) of the Act by announcing directly to the labor and delivery room registered nurses that they would be required to become certified in Advanced Cardiac Life Support (ACLS) without notifying the OPEIU and providing it with the opportunity over these unilateral changes.

The evidence shows that training and certification requirements for registered nurses have been negotiated by the parties in the past and carried forward as a term and condition of employment when MNA and Respondent entered into negotiations for a renewal contract. Specifically, the contract negotiated between the MNA and the Respondent for the term January 31, 1999, through January 31, 2001, required labor and delivery room registered nurses to be certified in neonatal resuscitation. (R. Exh. 27, p. 59.) The same draft contract also required certain departments, excluding the labor and delivery department, to be certified in ACLS, namely: P.A.R.; Short Stay Surgery; Emergency Department; ICU, CCU; Pre-Operative Phase; Recovery Room; and Endoscopy Clinic.

The evidence shows that in January 2000, the Respondent changed the terms and conditions of employment for the labor and delivery registered nurses by unilaterally mandating that they become certified in ACLS. A memo was sent directly to the labor and delivery registered nurses advising them that they had to become certified within the year 2000. The evidence shows that if the labor and delivery nurses did not become certified, they would be terminated. (Tr. 446.)

The Respondent seeks to explain its conduct by stating that its actions were required by its Conscious Sedation policy and that it wanted to be in compliance with the policy in order to pass an upcoming audit with the Joint Commission on Accreditation of Hospital Organization. The evidence shows, however, that the Conscious Sedation policy had been in effect since December 1995 (R. Exh. 10, p. 1), and that it was revised in October 1999 (R. Exh. 10, pp. 2 and 5), long after the terms and conditions of employment were established through negotiations between the MNA and the Respondent. The evidence also shows that even though not all of the labor and delivery registered nurses had become certified at the time of the JACO audit in March 2000, there were no negative ramifications. Thus, the evidence shows that there was ample time for the Respondent to notify the new certified OPEIU and negotiate the changes in the training and certification requirements.

The Respondent unpersuasively asserts that the OPEIU never requested to bargain over these unilateral changes and therefore it waived that right. According to the unrebutted testimony of Chief Steward Barbara Chubb, she sought to schedule a meeting with several hospital administrators, including Kathy Heniff, clinical coordinator for the labor and delivery department, to discuss the ACLS requirement, but Heniff refused to meet with the union.[34] (Tr. 52–54.) Chubb subsequently wrote to Assistant Vice President Murphy seeking to clarify the reasons for the new requirement and reserving "the right to bargain on this issue." (GC Exh. 6.) Jagels wrote back stating the "Crittenton Hospital management has the responsibility and duty to effectuate standards of Nursing Practice in the institution. To that end, the requirement of ACLS certification will remain as stated." (GC Exh. 7.) Jagels also testified that he did not see any need to notify the OPEIU about the change because this was a "health standard" and not a bargainable issue. (Tr. 445.) Thus, the evidence discloses that the ACLS requirement was a fait accompli and that the Respondent was unwilling to discuss the matter.

Accordingly, I find that by requiring the labor and delivery nurses to become ACLS certified, and by announcing the requirement directly to those nurses, the Respondent unlawfully made unilateral changes to terms and conditions of employment, unlawfully dealt directly with the bargaining unit employees, and unlawfully refused to confer with the union about those changes in violation of Section 8(a)(5) of the Act.

(4) Unlawful unilateral changes requiring pediatric and surgical unit nurses to be cross-trained

Paragraph 14 of the OPEIU amended consolidated complaint asserts that on or about June 19, 2000, the Respondent moved the pediatrics department thereby combining it with the medical surgical unit, and then required the cross-training of all pediatric and medical surgical registered nurses without prior notice to the OPEIU and without affording it an opportunity to bargain.

The evidence discloses that in early June 2000, a decision was made to combine the pediatrics and medical surgical units. Respondent's managers met to coordinate the relocation which was to take place on June 19, 2000. The Respondent's managers also outlined a process for cross-training pediatric and medical surgical nurses to perform each other's job. (GC Exh. 11.) The issue here is not whether the Respondent has a right to relocate a department within the Hospital. Rather, the issue is whether the Respondent had the right to unilaterally require the cross-training of registered nurses without bargaining with the OPEIU. Mandatory cross-training is a term and condition of employment, particularly since it was required in order for the affected registered nurses to maintain their employment status in those departments.

The Respondent does not argue otherwise. Rather, it asserts that the OPEIU never made a request to bargain over mandatory cross-training. The evidence discloses, however, that by letter, dated June 13, 2000, OPEIU President Kasper wrote Jagels stating, "Staff nurses have also informed me Crittenton

[34] Heniff was not called at trial to testify. When a party fails to call a witness who may reasonably be assumed to render favorable testimony to that party, an adverse inference may be warranted that the person's testimony would not have been favorable had he/she been called to testify. *International Automated Machines,* 285 NLRB 1122, 1123 (1987). I find that an adverse inference is warranted.

is making unilateral changes in the Pediatric Department without notifying the Union . . . . A communication was sent to you with various dates to begin negotiations. The Local has not received an answer to this. Do you have any dates you would like to offer?" (G.C Exh. 53.) There is no evidence that Jagels responded to this letter. The evidence does show that despite Kasper's letter the Respondent implemented the relocation and cross training on June 19.

In its posthearing brief at page 38, Respondent's counsel mischaracterizes Kasper's testimony by stating that she admitted at trial that the OPEIU did not make a request to bargain. To the contrary, when asked by Respondent's counsel whether the union made a written request to bargain, Kasper referred to the June 13 letter as follows:

> Q. And prior to June 19th, as I understand it, you did not make a written request to Mr. Jagels to bargain about this move?
>
> A. I don't believe so, except for this June 13th.
>
> Q. Prior to the move on June 19th, you had not made a written request to bargain over the move?
>
> A. Right here in this letter I write that the union will work with you to help resolve this.
>
> Q. You didn't ask for a bargaining session, did you? (Tr. 225.)
>
> A. Not in that letter, No. (Tr. 226.)

I find that the June 13 letter constituted a demand to bargain, even though Kasper did not specifically proffer a date to meet. After all, the evidence viewed as a whole show that the parties were contemplating meeting in July to negotiate. In any event, the evidence shows that the Respondent chose to ignore the July 13th letter. *Marysville Travelodge,* 233 NLRB 527, 532 (1977) Accordingly, I find that the Respondent unilaterally changed a term and condition of employment without affording the OPEIU the opportunity to bargain by requiring the pediatric and medical surgical unit registered nurses to be cross-trained in violation of Section 8(a)(5) of the Act.

(5) Unlawful failure to provide information to OPEIU

(a) The legal standard

Under the Act, an employer is required to provide information to a union, on request, that is relevant and necessary to the union's role in the bargaining process. *Beverly Health & Rehabilitation Services,* 335 NLRB 635, 658 (2001). The standard for relevancy is a liberal, discovery type standard. *NLRB v. Acme Industrial Co.,* 385 U.S. 432 (1967). By its very nature, information concerning terms and conditions of employment of the employees employed within the bargaining unit represented by the union, is "presumptively relevant" to the Union's proper performance of its collective-bargaining duties because such information is at the core of the employee-employer relationship. *Watkins Contracting, Inc.*, 335 NLRB 222, 224 (2001). In such cases, the employer has the burden of proving lack of relevance. Where the request is for information concerning employees outside of the bargaining unit, the union must show that the information is relevant. *Island Creek Coal Co.,* 292 NLRB 480, 487 (1989), enfd. 899 F.2d 1222 (6th Cir. 1990). Once the initial showing of relevance has been made, the employer has the burden to prove either a lack of relevance or to provide adequate reasons as to why it cannot, in good faith, supply such information. *Coca-Cola Bottling Co.,* 311 NLRB 424, 425 (1993).

(b) Background

The MNA was the certified representative for the registered nurses for several years before it ultimately lost a second election to the OPEIU on August 22, 1999. Immediately after the OPEIU became certified on November 22, 1999, as the exclusive representative of the Respondent's registered nurses, it was confronted with numerous issues affecting its bargaining unit members, including, the unilateral changes made to the flexible benefits plan and the investigatory meeting with Marie Szczerba. At the same time, the OPEIU was attempting to elect its local union officers at the Hospital, elect a bargaining team, and initiate negotiations for an initial collective-bargaining agreement. The convergence of all of these events heightened the newly certified union's need for information in order to adequately represent its new constituency.

(c) Unlawful refusal to provide information concerning pending unresolved grievances

Paragraph 21 of the OPEIU amended consolidated complaint alleges that the Respondent failed to respond to a request for information concerning unresolved pending grievances that were filed by the predecessor MNA.

The evidence shows that on December 2, 1999, the MNA counsel wrote to the OPEIU's then counsel seeking to find out if the newly certified union wanted to assume responsibility for several cases awaiting arbitration. There is no evidence that OPEIU's counsel ever responded to the letter. (GC Exh. 45.)

On February 2, 2000, OPEIU President Kasper wrote to Jagels stating that she had learned that the Hospital had scheduled a meeting for February 7 with the MNA to discuss outstanding grievances.[35] (GC Exh. 44.) Kasper sought to be present at the meeting and stated that it was the OPEIU's intention to monitor all discussions between the MNA and Respondent in order to protect the rights and interests of the bargaining unit members, as well as the union itself. The evidence shows that Kasper asked for "the date, time and location of any meetings scheduled with the MNA, and the purpose for the meeting." She also stated, "[a]ssuming the meeting is to discuss grievances filed by the MNA prior to being replaced as the certified representative, please provide to me copies of all such grievances to be discussed, along with the Hospital's grievance answers, as well as all correspondence between the parties, step answers, appeals, meeting notes, or other documents relating to the grievances." She further sought "the date and subject of discussion of any meetings (in person or via telephone) that have taken place between you and MNA representatives subsequent to the date OPEIU Local 40 was certified. If there are any documents that were produced or received establishing such meetings, or as the result of the meetings, please provide those documents to me."

[35] The evidence does not disclose whether these outstanding grievances were the same grievances referenced in the MNA's December 2, 1999 letter.

Jagels did not respond to the letter nor did the Respondent provide any of the information requested. Rather, on February 7, 2000, Respondent's attorney, Lawrence F. Raniszeski, Esquire, faxed a letter to OPEIU counsel, Scott A. Brooks, Esquire, asking whether the OPEIU was willing to assume responsibility for the grievances, all of which occurred prior to the date the OPEIU was certified. (GC Exh. 45.) When Brooks did not respond within a week, Raniszeski wrote to him again stating that the meeting with the MNA had been postponed and that if "OPEIU intends to assume any of the grievances" it should contact the MNA right away. (GC Exh. 46)

On February 17, Brooks faxed a reply to Raniszeski stating:

> The main reason OPEIU Local 40 has not responded to date is that Crittenton Hospital has not provided it the information requested in Local 40 President Kasper's February 2, 2000 letter to Mr. Jagels. Certainly Crittenton cannot expect a response without first providing the grievance material requested; this material is of paramount importance in Local 40's analysis of its legal rights and responsibilities. If Crittenton is in fact refusing to provide this information, please inform me without delay so we can take appropriate legal action. If not, please have your client provide it without further delay, so that my client can complete its analysis. [GC Exh. 47.]

On February 23, Raniszeski responded to Brooks February 17 letter, and Kasper's February 2 letter stating that the Respondent has a legal obligation to meet with the MNA, the OPEIU does not have a right to be present at the meeting, citing *Arizona Portland Cement Co.*, 302 NLRB 36 (1991), and that since the Respondent does not have to deal with the OPEIU concerning those grievances, it does not have to provide the information. (GC Exh. 50.) Raniszeski concluded by stating that upon further reflection the Respondent preferred to resolve the matters with the MNA.

The evidence therefore shows that on February 2, and for a short time thereafter, the MNA and the Respondent were inclined to allow the OPEIU to assume responsibility for the pending unresolved grievances. The evidence further shows that the information sought by Kasper's letter pertaining to those grievances was necessary for it to make a determination as to nature and status of the grievances, and whether it was willing to assume responsibility for them. Thus, I find that the information sought pertaining to the grievances was relevant to the OPEIU's role as the exclusive bargaining representative and should have been provided. The fact that the lawyers for both sides subsequently became impatient with each other and got into a "snit" over turning over the information does not change the fact that at the time of the request the information was relevant and necessary to make a decision as to whether to takeover the grievances and that the failure to provide that information precluded the OPEIU from assuming responsibility for them. Accordingly, I find that the Respondent violated Section 8(a)(5) of the Act as alleged in paragraph 21 of the OPEIU amended consolidated complaint.

(d) Unlawful withholding of information pertaining to nurse Adelaida Cruz

Paragraph 22 of the OPEIU amended consolidated complaint alleges that Respondent unlawfully failed and refused to furnish information requested in letters sent by the union on February 28, and May 10, 2000, concerning the discipline of nurse Adelaida Cruz.

1. Letter of February 28, 2000

The evidence shows that on February 16, 2000, nurse Cruz was advised by letter from Jagels that an investigation was underway involving her alleged disruptive conduct in a patient care area on February 11, 2000, which could result in progressive discipline. (GC Exh. 12.) Jagels sent a copy of the letter to "M. Kiley," the chairperson of the OPEIU bargaining group at the Hospital. (Tr. 453.) On February 24, Chief Steward Chubb wrote to Jagels asking to postpone a disciplinary meeting scheduled for Cruz on February 28 to allow the union to gather information concerning the allegations and also asking for him to provide the information relating to the investigation. (GC Exh. 14.) The meeting nevertheless was held on February 28, with Chubb in attendance, at which time Cruz was terminated. (GC Exh. 15.)[36] According to Chubb's unrebutted testimony, Jagels told her he would not provide the information requested because it was not relevant. (Tr. 72.)[37]

On February 28, 2000, Chubb sent Jagels another letter requesting the following information in order to prepare a grievance:

> 1. Adelaida Cruz' personnel file
> 2. The absentee record of all bargaining unit RN's over the past 3-years.
> 3. Any and all documents relied upon by the employer in the discipline of Adelaida Cruz.
> 4. The names of all employees disciplined for absenteeism within the past 3-years, dates and descriptions of each discipline, and the amount of absences that led to each discipline. [GC Exh. 16.]

On March 2, 2000, Jagels responded by stating, in relevant part:

> This will also acknowledge receipt of your information request dated February 28, 2000. Please be advised that it would be a violation of Crittenton Hospital policy as well as governing statutes and laws of the State of Michigan to release the personnel file of any Crittenton employee without appropriate release authorization. Records relative to the Absentee Record of other RN's at this institution is irrelevant to the present grievance and unavailable for

[36] The Corrective Action Form given to Cruz, however, indicates that she was terminated for excessive absenteeism and does not mention disruptive behavior on February 11. (GC Exh. 15.)

[37] The evidence shows that on February 26, 2000, Jagels met with MNA Labor Counsel Kathryn E. Martel, Esquire, on a grievance filed on October 22, 1999, by the MNA on behalf of Cruz for allegedly refusing to work an extra shift for which she received a written warning and a 3-day suspension. (GC Exh. 22, pp. 6, 5, 4, 3.)

> your review secondary to confidentiality and privilege concerns.
>
> I am, however, prepared to release the personnel file of Ms. Cruz and documents related to the decision to execute discipline. I will release this documentation to you once an appropriate release authorization from Ms. Cruz has been provided. A nominal copying charge is applicable.
>
> To summarize, Crittenton will not comply with the requests set forth in paragraphs two and four of your request. We will provide you with the documents requested in paragraph one and three of your request with appropriate release authorization from the involved employee. [GC Exh. 19.]

After Chubb provided a signed release by Cruz, Jagels produced her personnel file, which contained the prior disciplinary actions taken against her. (Tr. 118–119.)

I find that the requested information which was not provided and which is referenced in paragraphs two and four of Chubb's February 28 letter is relevant to the OPEIU's role of representing Cruz and representing the bargaining unit. The evidence shows that excessive absenteeism was the basis of the termination for Cruz. (GC Exh. 15.) The evidence further shows that request sought 3 years of absenteeism records for the bargaining unit employees now represented by the OPEIU, as well as other specific information disclosing the nature and type of discipline imposed on other employees. As the newly certified bargaining representative, it was important for the OPEIU to have a complete understanding of the past discipline of its bargaining unit employees and others with respect to absenteeism in order to assess whether the discipline of Cruz was fair and consistent. Thus, contrary to the Respondent's assertions, the information was relevant. In any event, under Board law, with presumptively relevant information, "a union is not required to prove the precise relevance of such information unless the Respondent submits evidence sufficient to rebut the presumption of relevance." *Mathew Readymix, Inc.,* 324 NLRB 1005, 1009 (1997). The Respondent has not done so.

The Respondent argues that it was justified in not providing the information for confidentiality reasons and relies on a Michigan statute and Hospital policy to support its position. As stated in *Watkins Contracting, Inc.*, supra at 226:

> "The Board is required to balance a union's need for the information against any legitimate and substantial confidentiality interest established by the employer." *Earthgrains Baking Companies, Inc.*, 327 NLRB No. 115, (1999) slip op. pp. 11–13; *see, e.g., Exxon Co. USA*, 321 NLRB 896 (1996); *Good Life Beverage Co.*, 312 NLRB 1060 (1993). "However, it is also well settled that as a part of this balancing process, the party making a claim of confidentiality has the burden of proving that such interests are in fact present and of such significance as to outweigh the union's need for the information." *Jacksonville Area Assn. for Retarded Citizens,* 316 NLRB 338, 340 (1995). "Where the employer fails to demonstrate a legitimate and substantial confidentiality interest, the union's right to the information is effectively unchallenged, and the employer is under a duty to furnish the information."

The Respondent's reliance on the Bullard-Plawecki Employee Right to Know Act, MCLA Section 423.501, et seq. is misplaced. The stated purpose of the statute is "to permit employees to review personnel records; to provide criteria for the review; to prescribe the information which may be contained in personnel records; and to provide penalties." The Respondent does not cite any specific provision of this state law to support its assertion that employee authorization is required prior to the release of information. A careful review of the statute shows that there is no such requirement. Section 423.506 of the Michigan law states;

> Sec. 6. (1) An employer or former employer shall not divulge a disciplinary report, letter of reprimand, or other disciplinary action to a third party, to a party who is not a part of the employer's organization, or to a party who is not a labor organization representing the employee, without written notice as provided in this section.
>
> (2) The written notice to the employee shall be by first-class mail to the employee's last known address, and shall be mailed on or before the day the information is divulged from the personnel record.

Thus, the Respondent's assertion that it is required to obtain a signed release under Michigan state law is patently false. With respect to its assertion that Hospital policy requires a signed employee authorization prior to releasing the information, the Respondent has not shown a legitimate and substantial confidentiality interest in not disclosing disciplinary information about bargaining unit employees to their exclusive bargaining representative.

Accordingly, I find that the Respondent unlawfully withheld information requested in the February 28, 2000 letter in violation of Section 8(a)(5) of the Act.

2. Letter of May 10, 2000

On April 24, 2000, Chubb wrote again to Jagels requesting the following information pertaining to the discharge of Adelaida Cruz:

> 1. Any and all materials concerning previous grievances filed by Aida Cruz and the outcome of these grievances with particular attention concerning a grievance filed in relation to a corrective action Aida received on May 31, 1994.
>
> 2. Information including but not limited to Nurse managers notes and Nursing Supervisor's notes. In particular Sue Holsinger's file on Aida Cruz that would be kept on the unit.
>
> 3. Any and all investigative material concerning Aida Cruz.
>
> 4. Any and all legal correspondence related to any issue involving Aida Cruz.
>
> 5. A copy of the Corrective Action Policy that would have been in effect September 14, 1995.

When Jagels failed to respond to this letter, Chubb sent him another letter on May 10, 2000, enclosing a copy of the April 24 letter, and asking for a response.

On May 10, Jagels wrote back answering the April 24 letter as follows:

> 1. Your request for information concerning a grievance filed in 1994 and its outcome is irrelevant to any recent action taken by the Hospital. I will however provide you with information on the most recent actions taken by the Hospital and their outcomes.
>
> 2. This request for the manager's file is broad in its application and I would require some justification since you have been provided her personal file.
>
> 3. I am not aware of any investigative material concerning Ms. Cruz.
>
> 4. I am not aware of any legal correspondence regarding Ms. Cruz and if there were it would be protected by attorney-client privilege.
>
> 5. The Corrective Action Policy that was in effect in 1995 is the same policy in effect today. Copies were mailed to Ms. Vicki Kasper with a similar request.

On May 26, Chubb responded by explaining that the 1994 grievance was relevant because she believed it was part of the underlying basis for a 3-day suspension and final warning letter that Cruz received in October 1999, and which was part of the underlying basis for the February 28, 2000 termination. (GC Exh. 24.) She also asserted that the manager's file should have been provided with Cruz' other files. Finally, she pointed out that in his February 16, 2000 letter, Jagels stated that "an investigation of [Cruz'] behavior has begun" and therefore was requesting information pertaining to that investigation.

On October 3, the Respondent provided Chubb with copies of the 1994 grievance procedure file, but no other documents.

I find that the 4-month delay in providing the information, without a response to Chubb's' May 26 letter is, in itself, sufficient to establish a violation of the Act. *Bundy Corp.*, 292 NLRB 671 (1989); *Ellsworth Sheet Metal, Inc.*, 232 NLRB 109 (1977). In its posthearing brief at pages 45–46, the Respondent does not offer any justification, substantial or otherwise, for its failure to provide the manager's file and the investigatory file. The evidence supports a reasonable inference that both files contained information relating to the discipline of Cruz. Accordingly, by failing to provide the information in a timely manner and by failing to provide the manager's file and investigatory file violated Section 8(a)(5) of the Act.

(e) Parking tickets

Paragraph 23 of the OPEIU amended consolidated complaint alleges that the Respondent unlawfully refused to provide information concerning employee parking. Chief Steward Chubb testified that "[e]mployees were receiving parking tickets for parking" in areas close to the Hospital, rather than in designated areas farther away from the facility. (Tr. 84.) She stated that after three parking tickets, an employee's car would be towed, and it could lead to progressive discipline. On March 20, 2001, she sent Jagels a letter that among other things stated:

> In order to investigate a potential grievance, I am requesting the following information:
>
> 1. The number of employees who have received parking tickets in the past two years.
>
> 2. The number of Reg. Nurses to receive parking tickets in the past two years.
>
> 3. The dates of the parking tickets issued in the past two years.
>
> 4. The time of day the parking tickets were issues (sic) for the past two years.
>
> 5. The number of Reg. Nurses to be disciplined for parking tickets in the past two years, and what shift these nurses were working at the time these tickets were incurred. [GC Exh. 25.]

On March 24, Jagels responded as follows:

> I am in receipt of your correspondence dated March 20, 2000 in which you are requesting information to process a "potential grievance." Please be advised that your request is denied on the following grounds:
>
> (1) OPEIU was certified as the representative of Registered Nurses in November of 1999. Your request for information back two years for all employees and for Registered Nurses does not fall under your purview as Chief Steward.
>
> (2) Information contained in an employee's Personnel File is confidential and will not be released to any third party without proper authorization.
>
> (3) Since as you state the grievance is "potential" there is no requirement that I share any information with you. [R. Exh. 11.]

Chubb testified that she explained in a followup letter to Jagels, dated March 28, that she was interested in statistics and did not want names or personal information. (G. C. Exh. 26.) However, Jagels did not respond.

To the extent that Chubb sought information pertaining to nonbargaining unit employees, the burden is upon the OPEIU to prove the relevance of that information. I find that the OPEIU has failed to satisfy its burden.

With respect to the information pertaining to registered nurses, the information is presumptively relevant. The burden therefore is upon the Respondent to show that it is not relevant to the union's duties as the exclusive bargaining representative of the bargaining unit employees. The evidence shows that Chubb clarified for Jagels that she was seeking "statistical" information to assess whether the parking ticket policy was impacting on the OPEIU bargaining unit. The Respondent has not explained why that type of information would be confidential. Further, as the newly certified bargaining representative, the OPEIU was entitled to seek information for a reasonable time period prior to the time it became the certified representative. I find that the prior 2-year period was a reasonable time period.

Accordingly, I find that the Respondent violated Section 8(a)(5) of the Act by failing to provide the requested information pertaining to registered nurses sought in the March 20, 2001 letter.

(f) Failure to promptly update employee list

The evidence shows that on July 20 and 24, 2000, OPEIU Vice-President Kasper asked the Respondent to update lists of bargaining unit employees' names, addresses and phones numbers. (GC Exhs. 54 and 55.) The evidence further shows the Respondent did not provide the updated information until October 11, and that it did so only after the OPEIU filed an unfair labor practice. Names, addresses, and telephone numbers of bargaining unit employees are presumptively relevant information. *Dynatron/Bondo Corp.*, 305 NLRB 574 (1991). Unreasonable delay in providing such information is as much a violation of the Act as a refusal to furnish the information at all. *Bundy Corp.*, supra (violation of the Act to ignore or delay supplying the union with necessary information for 2-½ months).

The Respondent unpersuasively asserts that no violation should be found because the information was eventually provided and because the parties have subsequently agreed on a procedure for providing updated information. Those events, however, do not alter the fact that the Act was violated.

Accordingly, I find that the Respondent violated Section 8(a)(5) of the Act for failing to promptly provide updated lists of bargaining unit employees names, addresses, and phone numbers.

(g) Refusal to provide information underlying investigative reports

On July 17, 2000, Chief Steward Chubb wrote to Jagels telling him that she had two "Investigation Reports" that were given to two bargaining unit members: Lisa Lockwood and Kevin Shane. (GC Exh. 29.) Lockwood's investigative report concerned complaints from unspecified coworkers that she received too many personal phone calls. Chubb sought copies of any documentation signed and/or submitted by the coworkers to support their assertions or otherwise demanded that Jagels remove the investigation reports from her file and send a letter to Chubb within 7 days confirming that the report had been removed. With respect to Shane, he received an investigative report for becoming agitated in the emergency room while attempting to receive treatment for himself after receiving a needle-stick injury while attending to a patient who was diagnosed with hepatic encephalopathy. Chubb asked to have the investigative report removed from his personnel file and also asked Jagels to confirm that it had been removed within 7 days.

When Jagels failed to respond to Chubb's letter, she sent another letter, dated July 31, 2000, reiterating the request. Jagels never responded. At trial, Jagels admitted that he never responded to Chubb's letter. He testified that he did not provide the information "because I did not believe and still don't believe that they had any right to have that information." (Tr. 466.) He elaborated that "[t]here is nothing that was entered into the employee's personnel file. If anything had been entered into the employee's personnel file, of course the employee could have accessed it or the Union could have accessed it with a signed release. These are just nothing more than investigative reports. So, behavior occurred, management addressed it and that's the end of the issue." (Tr. 466.) Jagels stated that no discipline was imposed.

Jagels response is misleading and unconvincing. He did not testify that the documents requested never existed. Rather, he stated that they were not added to the employee's personnel file. Chubb did not ask for documents in the employee's personnel file. She asked for documents relating to the investigatory reports, regardless where they existed. The Respondent's refusal to provide information concerning employee conduct which could possibly lead to discipline was unlawful. Also, the fact that Jagels was personally satisfied that the matter had been properly resolved is of no consequence. The OPEIU was entitled to review the information in order to properly represent its members and ensure that their rights were being protected.

Accordingly, I find that the Respondent violated Section 8(a)(5) of the Act by failing to provide the information relating to the investigative reports given to Lisa Lockwood and Kevin Shane.

b. The 8(a)(1) violation

Paragraphs 18–20 of the OPEIU amended consolidated complaint allege that on November 29 and December 1, 1999, the Respondent held investigatory interviews with Nurse Marie Szczerbia, on a matter that she had reasonable cause to believe would result in discipline, and despite her requests, she was denied the right to have a union representative present.

It is settled law that a bargaining unit employee is entitled to have a union representative present in an investigatory interview which the employee reasonably believes might result in disciplinary action. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975). Compelling an employee to attend such an interview when his request for union representation has been denied violates Section 8(a)(1) of the Act. 420 U.S. at 258–259.

The undisputed evidence shows that on or about November 26, 1999, Operating Room Manager Sharon Lewer told Maria Szczerba that she was going to be disciplined for leaving work without permission on November 23. (Tr. 122–123.) On November 29, Szczerba was told to report to Jagels' office. She asked for a union representative at that time and also when she arrived at Jagels' office. (Tr. 123, 537.) Both times, her request was denied.

Jagels' testified that he did not know who to call because he did not have the name of a union representative at the Hospital. His explanation is incredulous. The evidence shows that on November 23, Kasper wrote to Gatz objecting to the unilateral changes in the flexible benefits plan and asking Gatz to contact her. She listed her work phone number, pager number, cell phone number, and e-mail address. (GC Exh. 32.) Jagels had all of this information on November 29, because on that date he personally responded to Kasper's November 23 letter.

Had Jagels wanted to afford Szczerba her *Weingarten* rights, he could have done so.

The Respondent also asserts that *Weingarten* does not come into play because the November 29 meeting was not investigatory. The evidence shows otherwise. Szczerba credibly testified that inside Jagels' office she explained her version of what occurred and asked Jagels to have the nurse who relieved her called to the meeting to corroborate her story, but Jagels refused to do so. Jagels testified that Szczerba did not tell him what had happened on November 23. For demeanor reasons, I

credit Szczerba's testimony on that she told Jagels her side of the story at the November 29 meeting.[38] Jagels also testified that he told Szczerba that he needed to investigate the matter and that in the interim she was being suspended pending his further investigation. (Tr. 124, 468–469.) I find based on the credible evidence that the November 29 meeting was "investigatory" and that Szczerba was denied her *Weingarten* rights.

On December 1, when Szczerba returned to work, she was summonsed to Jagels' office again. The credible evidence shows that she asked if she needed to have a union representative to which Jagels responded, "There's nobody to call. There's no contract. Why. I thought we discussed this before." (Tr. 129.) Jagels told Szczerba that she was being given a final warning in addition to a 3-day suspension. (Tr. 471.) I find that his meeting was not investigatory and therefore *Weingarten* was not implicated.

Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act on November 29, 1999, by denying Marie Szczerba her right to a union representative during an investigatory meeting that could, and did, result in discipline.

CONCLUSIONS OF LAW

1. Respondent, Crittenton Hospital, is an employer within the meaning of Section 2(2) of the Act and is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Charging Party Unions, Rochester Crittenton Medical Laboratory Employees Association (RCMLEA); Rochester Crittenton Radiological Employees Association (RCREA); Local 79, Service Employees International Union, AFL–CIO (SEIU); and Local 40, Office and Professional Employees International Union, AFL–CIO (OPEIU) are labor organizations within the meaning of Section 2(5) of the Act.

3. The Respondent, Crittenton Hospital, violated Section 8(a)(1) of the Act by denying Registered Nurse Marie Szczerba's request for union representation during an investigative meeting which she reasonably believed could lead to discipline and by telling her that there was no union to represent her at Crittenton Hospital.

4. The Respondent, Crittenton Hospital, violated Section 8(a)(5) of the Act by engaging in the following conduct:

(a) Unilaterally changing terms and conditions of the flexible health benefits plan as it applies to the bargaining unit employees represented by the RCMLEA, RCREA, SEIU LPN, and OPEIU by, among other things, requiring those employees to incur certain cost increases for plan benefits on and after January 1, 2000, and by changing the plan's terms, conditions and benefits.

(b) Dealing directly on November 22, 1999 with the bargain unit employees represented by the RCMLEA, RCREA, SEIU LPN and OPEIU by distributing a memorandum to them announcing changes to the flexible health benefits plan.

(c) Unilaterally deleting sections from a finalized collective-bargaining agreement with the SEIU LPN, refusing to reinsert those sections into the finalized contract, and failing and refusing to execute a finalized collective-bargaining agreement that contained those sections.

(d) Unilaterally changing the terms and conditions of employment of the bargaining unit employees represented by the OPEIU by requiring all labor and delivery room registered nurses to become certified in Advanced Cardiac Life Saving.

(e) Unilaterally changing the terms and conditions of employment of the bargaining unit employees represented by the OPEIU by requiring all pediatric and medical surgical registered nurses to be cross-trained in each other's department.

(f) Failing and refusing to timely respond and furnish requested information relevant to the OPEIU's performance of its duties as exclusive collective-bargaining representative.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent shall, upon request, execute the collective-bargaining agreement arrived at with the SEIU LPN and ratified by the LPN unit on June 8, 1999, containing article 7, section 3.13 and article 14, section 5.9 of the 1992–1995 contract, which the Respondent unilaterally deleted and has refused to reinsert since February 2000. The Respondent shall make whole those employees covered by the collective-bargaining agreement from February 1, 2000, forward, for any loss of earnings and other benefits suffered by them as a result of the Respondent's unlawful failure and refusal to execute the collective-bargaining agreement as requested on February 1, 2000,[39] plus interest as computed in *New Horizon for the Retarded*, 283 NLRB 1173 (1987).

Regarding the Respondent's failure to notify the RCMLEA, RCREA, SEIU LPN, and OPEIU and failure to give these unions an opportunity to bargain over the unilateral changes made by the Respondent to the terms and conditions of the flexible benefits plan implemented on July 6, 1998 for the RCREA, on January 1, 1999 for the RCMLEA and the registered nurses now represented by the OPEIU, and on June 8, 1999 for the SEIU LPN, and maintained as such through December 31, 1999, the Respondent shall restore the units' employees' terms and conditions of employment as they existed before the Respondent's unlawful unilateral changes on and after January 1, 2000, without withdrawing and/or retracting any wage increases and improvements in working conditions occurring after January 1, 2000, and shall maintain those conditions unless and until the Respondent reaches agreement with the unions respecting proposed changes or properly implements its proposal following a valid impasse in bargaining.

The Respondent shall also make all of the unit employees of the RCMLEA, RCREA, SEIU LPN and OPEIU whole, with interest, for any and all losses they incurred by virtue of the

[38] I further note that Assistant Vice President Murphy, who was present at the November 29 meeting and who testified at trial, did not corroborate Jagels recollection of what he and Szczerba discussed. (Tr. 547.)

[39] Par. 16 of the SEIU amended complaint alleges that from February 2000, and continuing to date, the Respondent has failed and refused to execute the contract with the deleted portions reinserted.

Respondent's unlawful unilateral changes in terms and conditions of employment on and after January 1, 2000, as computed in *New Horizon for the Retarded*, 283 NLRB 1173 (1987).

Regarding the Respondent's failure to notify the OPEIU and to give it an opportunity to bargain over the unilateral changes made by the Respondent to the certification training requirements of the labor and delivery room registered nurses and the cross-training requirements of the pediatric and medical surgical registered nurses, the Respondent shall cease and desist from imposing and implementing those unlawful unilateral changes and restore the unit employees' terms and conditions of employment as they existed before January 20 and June 19, 2000, respectively. Those conditions shall be maintained unless and until the Respondent notifies and bargains with the OPEIU reaching an agreement with the Union respecting the proposed changes or properly implementing its proposals following a valid impasse in bargaining. The Respondent shall make those unit employees whole, with interest, for any and all losses they incurred by virtue of the Respondent's unlawful unilateral changes in employees' terms and conditions of employment on and after January 20, 2000, for the labor and delivery room registered nurses and on or after June 19, 2000, for the pediatric and medical surgical registered nurses as computed in *New Horizon for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[40]

ORDER

The Respondent, Crittenton Hospital, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Denying registered nurses' requests for union representation during investigative meetings which the employee reasonably believes could lead to discipline and by telling them that they do not have union representation at Crittenton Hospital.

(b) Unilaterally changing terms and conditions of employment for bargaining unit employees represented by the RCMLEA, RCREA, SEIU LPN, and OPEIU by, among other things, requiring those employees to incur certain cost increases for the flexible health benefits plan on and after January 1, 2000, and by changing the plan's terms, conditions and benefits.

(c) Dealing directly on November 22, 1999, with the bargain unit employees represented by the RCMLEA, RCREA, SEIU LPN, and OPEIU by distributing a memorandum to them announcing changes to the flexible health benefits plan.

(d) Unilaterally deleting sections from a finalized collective-bargaining agreement with, SEIU LPN, refusing to reinsert those sections into the finalized contract, and failing and refusing to execute a finalized collective-bargaining agreement with the SEIU LPN that contained those sections.

(e) Unilaterally changing the terms and conditions of employment of the bargaining unit employees represented by the OPEIU by requiring all labor and delivery room registered nurses to become certified in Advanced Cardiac Life Saving.

(f) Unilaterally changing the terms and conditions of employment of the bargaining unit employees represented by the OPEIU by requiring all pediatric and medical surgical registered nurses to be cross-trained in each other's department.

(g) Failing and refusing to timely respond and furnish requested information relevant to the OPEIU's performance of its duties as exclusive collective-bargaining representative.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Forthwith reinsert the sections that it deleted from the finalized collective-bargaining agreement with the SEIU LPN, that is, article 7, section 3.13 and article 14, section 5.9, and execute that agreement with the SEIU LPN as it requested on and after February 1, 2000.

(b) Make whole, with interest, those employees covered by the SEIU LPN collective-bargaining agreement from June 8, 1999, the date of ratification, forward, for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful failure and refusal to execute the collective-bargaining agreement as requested on February 1, 2000, in the manner set forth in the aforesaid remedy section.

(c) At the unions' request, restore the RCREA, RCMLEA, SEIU LPN, and OPEIU unit employees' terms and conditions of employment as they existed before the Respondent's unlawful unilateral changes on and after January 1, 2000, and maintain those conditions, unless and until the Respondent either reaches agreement with the Union respecting proposed changes or properly implements its proposal following a valid impasse in bargaining.

(d) At the OPEIU's request, restore its unit employees' terms and conditions of employment as they existed before January 20, 2000, for the labor and delivery room registered nurses and before June 19, 2000, for the pediatric and medical surgical registered nurses, and maintain those conditions, unless and until the Respondent either reaches agreement with the Union respecting proposed changes or properly implements its proposal following a valid impasse in bargaining.

(e) Make the units employees whole, with interest, for any and all losses they incurred by virtue of the Respondent's unlawful unilateral changes in the employees' terms and conditions of employment, that is, with respect to the flexible health benefits plan on and after January 1, 2000; with respect to the training requirements for labor and delivery registered nurses on and after January 20, 2000; and with respect to the training requirements for the pediatric and medical surgical registered nurses on and after June 19, 2000.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other

[40] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of back pay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its hospital in Rochester, Michigan, copies of the attached notice marked "Appendix."[41] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 22, 1999.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. November 13, 2001

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT deny an employee's request for union representation during an investigative meeting which the employee believes may result in discipline and WE WILL NOT tell any registered nurses that they do not have union representation at Crittenton Hospital.

WE WILL NOT unilaterally change the terms and conditions of employment of employees represented by the Rochester Crittenton Medical Laboratory Employees Association, Rochester Crittenton Radiological Employees Association, Local 79 (LPN), Service Employees International Union, AFL–CIO, Local 40, Office and Professional Employees International Union, AFL–CIO, and more specifically, WE WILL NOT require those employees to incur certain cost increases in their flexible health benefits plan or by changing their plan's terms, conditions, and benefits without notifying the unions and providing the unions an opportunity to bargain over the proposed changes.

WE WILL NOT deal directly with the employees represented by the Rochester Crittenton Medical Laboratory Employees Association, Rochester Crittenton Radiological Employees Association, Local 79 (LPN), Service Employees International Union, AFL–CIO, Local 40, Office and Professional Employees International Union, AFL–CIO, by advising them of changes to the flexible health benefits plan without first notifying the unions and without providing the unions an opportunity to bargain over the proposed changes.

WE WILL NOT unilaterally delete sections from a finalized collective-bargaining agreement with Local 79 (LPN), Service Employees International Union, AFL–CIO, and WE WILL NOT refuse to reinsert those sections into a finalized contract, and WE WILL NOT fail and refuse to execute a finalized collective-bargaining agreement with Local 79 (LPN), Service Employees International Union, AFL–CIO, that contain those sections.

WE WILL NOT change the terms and conditions of employment of the employees represented by the Local 40, Office and Professional Employees International Union, AFL–CIO, by requiring all labor and delivery room registered nurses to become certified in Advanced Cardiac Life Saving without notifying the Union first and providing it an opportunity to bargain over any proposed changes.

WE WILL NOT change the terms and conditions of employment of the employees represented by Local 40, Office and Professional Employees International Union, AFL–CIO, by requiring all pediatric and medical surgical registered nurses to be cross-trained in each other's department without notifying the Union first and providing the Union an opportunity to bargain over any proposed changes.

WE WILL NOT fail and refuse to timely respond and furnish to Local 40, Office and Professional Employees International Union, AFL–CIO, requested information relevant to its performance of its duties as exclusive collective-bargaining representative of the registered nurses.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce in the exercise of rights guaranteed you by Section 7 of the Act.

WE WILL, upon a bargaining unit employee's request, promptly contact a union representative for any investigative meeting, which the employee reasonably believes may result in discipline.

WE WILL, upon request, reinsert those provisions deleted from the finalized collective-bargaining agreement with Local 79 (LPN), Service Employees International Union, AFL–CIO, and WE WILL forthwith execute the finalized collective-bargaining agreement with the Union.

WE WILL, at the Unions' request, restore the terms and conditions of employment of the employees represented by the Rochester Crittenton Medical Laboratory Employees Associa-

[41] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

tion, Rochester Crittenton Radiological Employees Association, Local 79 (LPN), Service Employees International Union, AFL–CIO, Local 40, Office and Professional Employees International Union, AFL–CIO, as they existed before our unlawful unilateral changes to the flexible health benefits plan on and after January 1, 2000, and WE WILL maintain those conditions, unless and until we either reach agreement with the Unions respecting proposed changes or we properly implement our proposal following a valid impasse in bargaining.

WE WILL make whole, with interest, the employees represented by the Rochester Crittenton Medical Laboratory Employees Association, Rochester Crittenton Radiological Employees Association, Local 79 (LPN), Service Employees International Union, AFL–CIO, Local 40, Office and Professional Employees International Union, AFL–CIO, for any and all losses they incurred by virtue of our unlawful unilateral changes in employees' terms and conditions of employment in the Crittenton Choice flexible benefits plan on and after January 1, 2000.

WE WILL, at the request of Local 40, Office and Professional Employees International Union, AFL–CIO, restore its unit employees' terms and conditions of employment as they existed before January 20, 2000, for the labor and delivery room registered nurses, and before June 19, 2000, for the pediatric and medical surgical registered nurses, and WE WILL maintain those conditions, unless and until we either reach agreement with the Union respecting proposed changes or we properly implement our proposal following a valid impasse in bargaining.

WE WILL, make whole, with interest, the employees represented by Local 40, Office and Professional Employees International Union, AFL–CIO, for any and all losses they incurred by virtue of our unlawful unilateral changes in the employees' terms and conditions of employment, that is, the training requirements imposed upon the labor and delivery registered nurses on and after January 20, 2000; and the training requirements imposed upon the pediatric and medical surgical registered nurses on and after June 19, 2000.

WE WILL recognize, deal with, and on request, bargain collectively and in good faith concerning rates of pay, hours of employment, and other terms and conditions of employment with the above-named Unions as the exclusive representative of our employees in their respective bargaining units.

CRITTENTON HOSPITAL